(19)

No. 02-891 Status: ARGUED
Title: Central Laborers' Pension Fund, Petitioner
v.
Thomas E. Heinz, et al.
Docketed: December 12, 2002
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (00-3314)
Decision Date: October 11, 2002
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Dec 10 2002	Petition for writ of certiorari filed. (Response due January 11, 2003)
Jan 7 2003	Order extending time to file response to petition to and including February 10, 2003.
Feb 10 2003	Brief of respondents Thomas E. Heinz, et al. in opposition filed.
Feb 10 2003	Brief amicus curiae of National Coordinating Committee for Multiemployer Plans filed.
Feb 10 2003	Brief amicus curiae of Central States, SE and SW Areas Pension Fund filed.
Feb 19 2003	Reply of petitioner Central Laborers Pension Fund filed.
Feb 26 2003	DISTRIBUTED for Conference of March 21, 2003.
Mar 24 2003	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 16 2003	Application (02A967) to recall and stay the mandate, submitted to Justice Stevens.
May 16 2003	Application (02A967) granted by Justice Stevens.
Oct 24 2003	Brief amicus curiae of United States filed.
Nov 4 2003	Supplemental brief of respondents filed. (TBP)
Nov 5 2003	DISTRIBUTED for Conference of November 26, 2003.
Dec 1 2003	Petition GRANTED.
Dec 23 2003	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including January 22, 2004. Respondents have until March 4, 2004 within which to file their brief on the merits.
Jan 14 2004	Consent to the filing of amici briefs in suppport of either party received from counsel for the respondents.
Jan 15 2004	Consent to the filing of amici briefs in support of either party received from counsel for the petitioners.
Jan 22 2004	Joint appendix filed.
Jan 22 2004	Brief of petitioner Central Laborers' Pension Fund filed.
Jan 22 2004	Brief amicus curiae of United States filed.
Jan 22 2004	Brief amici curiae of National Coordinating Committee for Multiemployer Plans, et al. filed.
Jan 22 2004	Brief amicus curiae of Central States, SE and SW Areas Pension Fund filed.
Jan 22 2004	Brief amicus curiae of Society for Human Resource Management filed.
Mar 2 2004	SET FOR ARGUMENT MONDAY, APRIL 19, 2004.
Mar 3 2004	CIRCULATED.
Mar 4 2004	Brief of respondents Thomas E. Heinz and Richard J. Schmitt, Jr. filed. (Distributed)
Mar 4 2004	Brief amicus curiae of AARP filed. (Distributed)

Mar 4 2004	Brief amicus curiae of National Employment Lawyers Association filed. (Distributed)
Mar 15 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 18 2004	Record received from U.S.C.A. 7th Circuit (1 envelope)
Mar 22 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 23 2004	Record received from U.S.D.C. for Central District of Illinois. (1 envelope)
Apr 8 2004	Reply of petitioner Central Laborers filed. (Distributed)
Apr 19 2004	Argued. For petitioner: Thomas C. Goldstein, Washington, D.C.; and on behalf of the United States, as amicus curiae, John P. Elwood, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondents: David M. Gossett, Washington, D.C.
Apr 20 2004	Letter from counsel for the petitioner received. (Distributed).

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No. ___

IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g), generally prohibits any pension plan amendment which has the effect of eliminating or reducing a participant's early retirement benefit or a retirement-type subsidy with respect to benefits attributable to service before the amendment. The Seventh Circuit, expressly acknowledging its direct conflict with a 1998 decision of the Fifth Circuit, held that a pension plan amendment which expands the types of post-retirement employment that trigger mandatory suspension of early retirement benefits violates the anti-cutback rule when applied to suspend the benefits of participants who retired before the amendment.

The question presented is whether a "suspension" of early retirement benefits pursuant to a multiemployer pension plan amendment is an "elimination" or a "reduction" of such benefits which would be prohibited by ERISA's anti-cutback rule.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner Central Laborers' Pension Fund (the "Pension Fund") is a multiemployer employee benefit plan and trust and has no corporate affiliations.

Respondents

Respondents Thomas E. Heinz and Richard J. Schmitt, Jr., are participants in the Pension Fund.

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CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The District Court's opinion granting Petitioner's judgment on the pleadings (App. 33a-45a) is unreported. The opinion of the Seventh Circuit Court of Appeals (per Williams, C.J., joined by Rovner, C.J. with Cudahy, C.J. dissenting), reversing (App. 3a-31a) is published at 303 F.3d 802. The order of the Court of Appeals denying Petitioner's motion to stay the mandate (App. 1a) is not otherwise published.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on September 13, 2002. This petition for writ of certiorari is filed within ninety days from that date. 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Employment Retirement Income Security Act § 204(g), 29 U.S.C. § 1054(g):

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participants in a more than de minimis manner. The Secretary of the

Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

STATEMENT OF THE CASE

Petitioner (Defendant below) Central Laborers' Pension Fund (the "Pension Fund") is a multiemployer benefit plan within the meaning of § 3(37)(A) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(37)(A). Subject matter jurisdiction in the District Court was premised upon 28 U.S.C. § 1331 and 29 U.S.C. § 1132. Respondents (Plaintiffs below) are participants in the pension plan.

Respondents were each 39 years old when they qualified for and began receiving a "service-only pension," which was available to Pension Fund participants of any age as long as they had earned 30 or more pension credits. Monthly payments under the service-only pension were equal to those available at normal retirement age (defined as age 65 by the plan), i.e., the benefit payments were not actuarially reduced to account for payments which began at an earlier age and which would continue for a longer period. The monthly benefit amount for each participant was calculated based on the contribution rates at which the participant's 30 pension credits were earned.

Under the terms of the plan, monthly benefit payments for those participants retiring prior to age 60, such as Respondents, were subject to suspension during periods in which participants worked in certain "disqualifying employment." When Respondents began receiving their benefits, the plan defined disqualifying employment for participants retiring before age 60 as employment:

in a job classification of any type specified and covered in a collective bargaining agreement or in any occu-

> pation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker). App. 4a.

After Respondents began receiving their monthly pension benefits, they continued employment as supervisors in the construction industry, which was not considered disqualifying employment under the existing definition. For two years Respondents received monthly pension benefits while they worked as construction supervisors. In 1998, pursuant to powers of amendment provided in the plan document and in reaction to the high rate of retirement among plan participants at very early ages, the trustees amended the plan to expand the definition of disqualifying employment (for participants retiring prior to age 53) to include work "in any capacity in the construction industry (either as a union or non-union construction worker)."[1] The disqualifying employment rules of the plan were intended to discourage both early age retirement and "double-dipping" whereby a retiree avails himself of retirement benefits but has not actually retired.

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[1] ERISA provides that certain suspension of benefit rules do not constitute a forfeiture of vested benefits proscribed by ERISA § 203(a), also cited as 29 U.S.C. § 1053(a). Specifically, § 203(a)(3)(B) provides that:

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—
>
> . . . (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed."

There is no dispute that the Plan's suspension rules, both before and after the amendment, complied with § 203(a)(3)(B) and Department of Labor regulations. App. 6a.

The Pension Fund construed this amended definition to cover Respondents' work as construction supervisors. When Respondents continued work in such capacity after being notified of the amended rules, their monthly benefits were suspended.

Respondents sued the Pension Fund, and the parties submitted cross motions for judgment on the pleadings. On August 9, 2000, the District Court, relying on *Spacek v. Maritime Ass'n.*, 134 F.3d 283 (5th Cir. 1998), held that ERISA's anti-cutback rule, 29 U.S.C. § 1054(g), does not apply to suspensions of early retirement benefit payments triggered by disqualifying employment. Additionally, the District Court held that the Pension Fund's interpretation of the amended disqualifying employment definition to include supervisory work was not arbitrary and capricious. Respondents appealed to the Court of Appeals on both issues.

On September 13, 2002, the Seventh Circuit reversed the District Court's decision in a 2-1 decision and remanded the matter for further proceedings. Judge Williams, writing for the majority, expressly rejected the Fifth Circuit's interpretation of the anti-cutback rule in *Spacek* and held that the plan amendment violated the anti-cutback rule. App. 3a-4a. Judge Cudahy vigorously dissented, stating:

> Though Judge Williams has put as persuasive a face as may be possible on the majority's opinion, I still find *Spacek* quite compelling. *Spacek*, it seems to me, presents straightforward and plausible arguments, not susceptible to rebuttal by the sometimes tortured contentions of the majority. App. 24a.

Acknowledging that its ruling was in conflict with the Fifth Circuit, the Court of Appeals (pursuant to Circuit Rule 40(e)) circulated the decision to all the members of the court in regular active service. A majority did not wish to hear the

case en banc with only one vote in favor of granting a rehearing en banc. On October 11, 2002, the Seventh Circuit denied Petitioner's motion to stay issuance of the mandate.

REASONS FOR GRANTING THE WRIT

The petition should be granted for three reasons. First, the conflict between the Fifth and Seventh Circuits centers on one of ERISA's most important provisions, the anti-cutback rule, and frustrates ERISA's objective of establishing uniformity in the administration of pension plans; second, if left unresolved, the conflict will have significant adverse consequences for pension funds throughout the country; and, third, the Seventh Circuit's decision is incorrect and is at odds with the plain meaning of ERISA's anti-cutback provision.

I. THE CONFLICT BETWEEN THE CIRCUITS DEFEATS ERISA'S GOAL OF UNIFORMITY.

The Seventh Circuit's explicit rejection of the Fifth Circuit's decision in *Spacek* results in a direct conflict between the circuits on the proper interpretation of one of ERISA's most significant provisions, the anti-cutback rule. The opposing readings of this rule by the respective circuits frustrate ERISA's purpose to provide a single standard for the administration of benefit plans.

The decisions of this Court have repeatedly recognized ERISA's goal of establishing a uniform set of regulations for the administration of employee benefit plans. In considering ERISA's pre-emption provision, this Court has regularly acknowledged the importance of eliminating any inconsistency imposed on ERISA by any state or local regulation. The Seventh Circuit's conflict with the Fifth Circuit in the application of the anti-cutback rule creates exactly the kind of inconsistency in employee benefit matters which ERISA was designed to eliminate. In the wake of the Seventh Circuit's ruling, multiemployer pension funds that have contributing

employers and participants in both the Fifth and Seventh Circuits are faced with administrative complexities and inconsistencies that this Court has prohibited previously by its interpretation of ERISA's pre-emption provision.

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1987), for example, this Court stated:

> It is thus clear that ERISA's pre-emption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

482 U.S. at 11, 107 S.Ct. at 2217.

Similarly, in *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 121 S.Ct. 1322 (2001), this Court stated:

> One of the principal goals of ERISA is to enable employers "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987). Uniformity is impossible, however, if plans are subject to different legal obligations in different states.

532 U.S. at 148, 121 S. Ct. at 1328.

If left to stand, the conflict between the Fifth and Seventh Circuits with regard to the anti-cutback rule will result in exactly the kind of balkanization of pension rules which ERISA was designed to prevent. The implications of this conflict for pension plans throughout the country are difficult to overstate.

II. IF LEFT UNRESOLVED, THE CONFLICT WILL ADVERSELY AFFECT PENSION PLANS THROUGHOUT THE COUNTRY.

The impact of the Circuits' conflicting interpretations of the anti-cutback rule will reach far beyond the parties in the instant case. As described below, the conflict between the *Spacek* and *Heinz* decisions will result in differences among pension funds in their ability to make plan amendments and will add complexity which Congress sought to avoid with a uniform administrative scheme.

A. The Circuits' conflict will result in disparate application of the anti-cutback rule.

The Fifth Circuit's decision in *Spacek* permits a pension plan to amend its disqualifying employment rules and apply the amendment to suspend the early retirement benefits of retirees who engage in such employment, holding that a "suspension" is not an "elimination" or a "reduction" of benefits proscribed by ERISA's anti-cutback rule. The Seventh Circuit, however, with its decision in the instant case, not only prohibits such an amendment and its application but goes even further by holding that any amendment which places "materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." App. 9a. In the wake of these two decisions, plan administrators and trustees are left facing a decidedly uneven playing field and a patchwork regulatory scheme which ERISA was designed to prevent.

Assume, for example, that the financial integrity of a multiemployer pension fund is jeopardized because of unexpectedly high retirement rates. If the fund is located in Texas, the trustees of the fund, in the interest of all its participants, may rely on the Fifth Circuit's ruling in *Spacek* to expand its disqualifying employment rules as to early retirement benefits for current retirees. Given the Seventh

Circuit's ruling in the instant case, however, a pension fund located in Illinois would not be able to take the same protective measures. Clearly, such a disparate result is completely inconsistent with ERISA's goal of uniformity.

The consequences of an unresolved split between circuits are even more significant for large pension funds that operate on a national scale or in numerous circuits. Consider, for example, the situation faced by a large multiemployer fund with administrative offices located in the Fifth Circuit but with contributing employers and participants in both the Fifth and Seventh Circuits. The administrator of such a fund faces the daunting task of properly applying the irreconcilable rulings of *Spacek* and *Heinz* in the administration of its plan. An even more complicated situation confronts a nationwide pension fund which has contributing employers and participants in the Fifth and Seventh Circuits, but whose administrative offices are located in a third circuit. Given the federal courts' broad construction of ERISA's venue provisions,[2] litigation would seem to be inevitable regardless of how the administrator attempts to apply these conflicting decisions to such a plan.

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[2] 29 U.S.C. § 1132(e)(2) provides an ERISA action ". . . may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found." This jurisdictional language has merged the analyses of jurisdiction and venue whereby venue may be deemed appropriate in any district where service of process can be effectuated. ERISA's nationwide service of process language, read together with 28 U.S.C. § 1391(c) and minimum contacts criteria involved in traditional due process analysis, *Burger King Co. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174 (1985), generally means that for ERISA actions, venue may be appropriate in any district in the United States. See, for example, *Medical Mut. of Ohio v. Desoto*, 245 F.3d 561, 567 (6th Cir. 2001); *Board of Trustees, Sheet Metal Workers' Nat'l Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035 (7th Cir. 2000); *Federal Fountain, Inc. v. KR Entertainment, Inc.*, 165 F.3d 600, 601-602 (8th Cir. 1999).

This Court has recognized that those charged with maintaining pension funds must coordinate complex administrative activities and that allowing a non-uniform scheme would introduce considerable inefficiencies in fulfilling those responsibilities. *Ft. Halifax*, 482 U.S. 1, 11, 107 S. Ct. 2211, 2217 (1987). The conflict resulting from the decision below introduces just this sort of problem for plan administrators and trustees. Clearly, officials of nationwide pension plans should not be required to maneuver through such starkly disparate readings of one of ERISA's most significant provisions.

B. The Seventh Circuit has created an "anti-amendment" rule that imposes a vague and uncertain standard.

The majority's opinion converts the anti-cutback rule into a wholesale "anti-amendment" rule. The majority effectively holds that in order to impose limitations on re-employment, a plan must apply those limitations not by amendment but by "a pre-existing plan provision" in the plan as "originally conceived." App. 20a. Such a construction unduly constricts the flexibility of plans to amend their provisions to address exigencies, including "double-dipping" which can affect the financial integrity of a plan even in good economic times. App. 28a, n2.

The Seventh Circuit's opinion also interprets the anti-cutback rule as a prohibition against amendments "placing materially greater restrictions on the receipt of the benefit . . . ." App. 9a. If this interpretation stands, then plan trustees will be constrained from protecting and preserving by amendment the fiscal integrity of the funds they administer for fear that litigation—in the face of allegations of proscribed cutbacks—will be required in order to determine whether the amendment constitutes a "material" change in conditions for the receipt of benefits. The potential disparate interpretation of "materiality" among circuits fundamentally

threatens the integral uniformity of ERISA and will chill the powers of trustees to meet the unforeseen effects of past trust policy regarding disqualifying employment.

The comment by the majority in *Heinz* (App. 15a) that "[w]e do not view the omission of a specific reference to suspensions in the anti-cutback rule as an oversight, but as unnecessary" inadequately addresses the issue and begs the question. A unanimous panel of the Fifth Circuit Court of Appeals in *Spacek*, as well as Judge Cudahy, opined that the omission of a specific reference to "suspensions" in the legislation, coupled with the consistent evidence of legislative history, Treasury regulations, and other case law, leads to the conclusion that a suspension of benefits was not intended to trigger the anti-cutback rule. In making its plan amendment, Petitioner reasonably relied upon the plain meaning of the anti-cutback rule as recognized in *Spacek*. The Seventh Circuit's ruling replaces plain meaning with a "materiality" standard which is vague and uncertain, at best, making plan administration more difficult and unpredictable.

III. THE SEVENTH CIRCUIT'S DECISION INCORRECTLY DISREGARDS THE PLAIN MEANING OF THE ANTI-CUTBACK RULE.

The Fifth Circuit's analysis of the anti-cutback rule in *Spacek* relies on straightforward interpretations of statutory and regulatory language. As Judge Cudahy in his dissent explains, the majority seeks to refute this analysis "with implausible and unconvincing arguments that do violence to the clear intent of the drafters." App. 31a. In Judge Cudahy's opinion, the three bases upon which *Spacek* rests have not been persuasively refuted by the majority in this case. Petitioner addresses each in turn.

A. The statutory language—a "suspension" is not a "reduction."

The Fifth Circuit in reviewing the plain meaning of the language of the anti-cutback rule concluded that it prohibits the "reduction" of benefits not their "suspension," a term which is wholly absent from the language of the rule. As noted in *Spacek* and by Judge Cudahy in his dissent in *Heinz*, "suspend" or its variants are used side-by-side with "reduce" or its variants in many sections of ERISA. The majority of the Seventh Circuit panel considering this case argued that "reduction" includes "suspension." For this interpretation to be correct, however, the use of "reduce" or its variants and "suspend" or its variants within the other sections of ERISA would be redundant. This in turn does violence to the basic tenet of statutory construction that each term must be given meaning. See *Spacek*, 134 F.3d at 289, citing *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 506, 133 L.Ed.2d 472 (1995). Judge Cudahy agreed, stating: "There is no doubt that the drafters knew how to include the concept of suspension, in contrast to that of reduction, when they wanted to do so. I find this plain meaning argument [approved in *Spacek*] to be quite convincing." App. 24a.

The plain meaning construction in *Spacek* is supported by the Sixth Circuit case of *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995), wherein the Court noted that 29 U.S.C. § 1054(g) did not apply to an amendment allegedly expanding restrictions on post-retirement employment because "suspension" was not a "reduction or elimination" of benefits. While the majority below dismissed this observation by the Sixth Circuit as *dicta* and because it lacked analysis, Judge Cudahy in his dissent surmised that the absence of analysis for such conclusion in *Whisman* was because of its obviousness within the plain meaning of the anti-cutback rule. App. 27a.

B. The applicable legislative history is consistent with the Fifth Circuit's plain meaning interpretation of the anti-cutback rule.

The *Spacek* decision relies next on the legislative history, to wit: the comments of Representative William Clay who introduced the House bill that became the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (the "REA"), which added Paragraph (2) to 29 U.S.C. § 1054(g), the "anti-cutback" rule. Representative Clay's remarks demonstrate support for the Fifth Circuit's plain meaning interpretation. In his dissent Judge Cudahy states that the Congressman's comment in the final House debates on the REA "appears to reflect an understanding at the time of the adoption of the anti-cutback rule that it did not apply to adjustments made by the plan (perhaps in the interest of the plan's financial integrity) to the rules involving suspension of benefits in the event of re-employment in the construction industry." Tellingly, the Fifth Circuit's reading of Representative Clay's remarks is consistent with 29 U.S.C. § 1053, with Treasury Regulation 26 C.F.R. § 1.411(c)-1(f), with *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995), and with the current Internal Revenue Service guidance.[3] App. 22a. Judge Cudahy finds the majority's attempt to explain away Representative Clay's comment unconvincing; in particular, he deems the majority's general argument against the value of

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[3] See Multiemployer Plan Examination Guidelines ("Guidelines") Section 4.72.14, *et seq.* of the Internal Revenue Manual, issued May 4, 2001 (available on WEST-LAW RIA-IRM database). These guidelines provide technical guidance regarding multiemployer plans to the Service's Employee Plan field personnel who examine multiemployer plans and other technical staff (4.72.14.1). Under Reorganization Plan No. 4 of 1978, § 101, 43 Fed. Reg. 47713, the IRS was given authority over ERISA's funding, participation, vesting and benefit accrual provisions, including § 411(d)(6) of the Internal Revenue Code, 26 U.S.C. § 411(d)(6), the counterpart to ERISA § 204(g).

legislative history "less weighty in the case of legislative history that fits so closely with the interpretation founded on plain meaning." App. 26a.

C. The applicable regulations support the Fifth Circuit's interpretation of the plain meaning of the anti-cutback rule.

The conflict between the Fifth Circuit in *Spacek* and the Seventh Circuit in *Heinz* extends beyond interpretation of the anti-cutback rule and into the construction of the supporting Treasury Regulations applicable to the anti-cutback rule. Specifically, Treasury Regulation 26 C.F.R. § 1.411(c)—1(f)(1) and 29 C.F.R. § 2530.203-3(a) provide that suspension of early (albeit accrued) retirement benefits is not proscribed if the suspension "does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." *Spacek*, 134 F.3d at 290 n.8. The Fifth Circuit in *Spacek* concluded that these regulations indicated the power of pension benefit plans to suspend early retirement benefits upon reemployment is even broader than the power of such plans "to suspend retirement benefits available at normal retirement age." *Ibid.* The Seventh Circuit rejected such notion as contrary to the right of the pension recipient to receive the accrued benefits "unconditionally," citing 26 C.F.R. § 1.411(d)-Q & A-1. However, Judge Cudahy in his dissent asserts that the majority got it wrong (and Petitioner agrees) because "the bar against 'increasing conditions' [referred to in the Regulation] appears to be a bar against *eligibility* requirements for pension participation" [citing 26 C.F.R. § 1.411(d)-Q & A-6], rather than a bar against suspension based on reemployment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
October 11, 2002

No. 00-3314

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Plaintiffs-Appellants,

v.

CENTRAL LABORERS' PENSION FUND,
Defendant-Appellee.

Appeal from the United States District Court
For the Central District of Illinois
No. 99 C 1388
Joe B. McDade, Chief Judge

Before Hon. Ann Claire Williams, *Circuit Judge*

The following are before the court:

1. MOTION TO STAY ISSUANCE OF MANDATE, filed on September 27, 2002, by counsel for the appellee.

2. RESPONSE TO DEFENDANT'S MOTION TO STAY ISSUANCE OF MANDATE (REQUEST FOR A BOND/RULE 41(d)(2)(C)), filed on October 10, 2002, by counsel for the appellants.

IT IS SO ORDERED that #1 is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 00-3314

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Plaintiffs-Appellants,

v.

CENTRAL LABORERS' PENSION FUND,
Defendant-Appellee.

JUDGMENT—WITH ORAL ARGUMENT

Date: September 13, 2002

BEFORE: Honorable Richard D. Cudahy, *Circuit Judge*
Honorable Ilana Diamond Rovner, *Circuit Judge*
Honorable Ann Claire Williams, *Circuit Judge*

Appeal from the United States District Court for the Central District of Illinois No. 99 C 1388, Joe B. McDade, Chief Judge.

The judgment of the District Court is REVERSED, with costs, and this case is REMANDED in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX C

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 00-3314

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Plaintiffs-Appellants,

v.

CENTRAL LABORERS' PENSION FUND,
Defendant-Appellee.

Argued Feb. 12, 2001
Decided Sept. 13, 2002

Before CUDAHY, ROVNER, and WILLIAMS, *Circuit Judges*.

WILLIAMS, *Circuit Judge*.

We are asked to decide whether a pension plan amendment which expands the types of post-retirement employment that trigger mandatory suspension of early retirement benefits violates ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g), when applied to suspend the benefits of the plaintiffs, who retired before the amendment. The district court, relying on *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir.1998), granted judgment on the pleadings in favor of the defendant pension fund. We reject the Fifth Circuit's interpretation of

29 U.S.C. § 1054(g) and hold that the amendment, which had the effect of reducing the plaintiffs' early retirement benefits, violates the anti-cutback rule.[1]

I. BACKGROUND

The facts are not in dispute. Plaintiffs Thomas E. Heinz and Richard J. Schmitt, Jr., are participants in a multi-employer pension plan administered by defendant Central Laborers' Pension Fund. Both plaintiffs, who were 39 years old when they retired in 1996, qualified for and began receiving monthly benefits payments under a "service-only pension," which was available to participants who retired at any age, so long as they had earned 30 or more pension credits. The monthly payments available under the service-only pension were the same as those available at normal retirement age—that is, the benefits were not actuarially reduced to take into account that payments began at an earlier age and would continue over a longer period. The monthly amount was determined based on the contribution rates at which the required 30 pension credits were earned.

Under the plan, monthly benefit payments for those retiring before age 60, like the plaintiffs, were subject to suspension for periods during which the participants worked in certain "disqualifying employment." At the time of plaintiffs' retirement, disqualifying employment was defined in the plan (for employees retiring before age 60) as employment:

> in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker).

[1] Because this opinion conflicts with the Fifth Circuit's decision in *Spacek*, it has been circulated pursuant to Circuit Rule 40(e) to all members of the court in regular active service. A majority did not wish to hear the case en banc. Judge Evans voted to grant rehearing en banc.

After their retirement, plaintiffs obtained jobs as supervisors in the construction industry, which was not disqualifying under the existing definition. For two years the plaintiffs worked as construction supervisors while collecting monthly pension benefits. Then, in 1998, the plan was amended and the definition of disqualifying employment was expanded to include (for participants who retired before age 53) work "in any capacity in the construction industry (either as a union or non-union construction worker)."[2] The Fund construed this amended definition as covering plaintiffs' supervisory work and suspended their monthly benefit payments.

The plaintiffs sued the Fund and, on cross motions for judgment on the pleadings, the district court entered judgment for the Fund. The district court, after careful analysis, held first, that the anti-cutback rule does not apply to suspensions of early retirement benefits payments triggered by disqualifying employment, and second, that the Fund's interpretation of the amended definition of disqualifying employment to include supervisory work was not arbitrary and capricious. The plaintiffs appeal on both grounds.

II. ANALYSIS

ERISA does not require employers to provide pension or early retirement benefits, or mandate a particular level of benefits. *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir.1992). Instead, "ERISA protects the benefits described in

[2] The amended plan distinguished between early retirement benefits that accrued before and after the amendment. For participants who retire before age 53, the amended definition of disqualifying employment quoted above applied to early retirement benefits that accrued before the amendment; benefits accruing after the amendment were subject to suspension for any kind of post-retirement work. (Amendment No. 7, Section 6.7(b) & (c).)

the Plan by ensuring that, if a pensioner is promised a benefit and fulfills the conditions required to receive it, the pensioner will actually receive the described and promised benefit." *Id.* at 469. ERISA protects benefits from forfeiture through detailed rules regulating vesting and accrual rates, which ensure the participant's right to receive promised benefits notwithstanding his or her consent to plan provisions that would otherwise require forfeiture. *See* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 121-22 (3d ed.2000).

One limited exception to the non-forfeiture rules is that pension plans may contain provisions requiring the suspension of monthly benefit payments if a participant works in certain jobs after retirement. *See* 29 U.S.C. § 1053(a)(3)(B)(ii); ERISA § 203(a)(3)(B). Under this exception, multiemployer plans may provide for suspension of benefit payments if the retiree works "in the same trade or craft, and the same geographic area covered by the plan." *Id.* For early retirement benefits, plans may contain even broader limitations on re-employment, according to a Department of Labor regulation promulgated under ERISA § 203(a)(3)(B). *See* 29 C.F.R. § 2530.203-3(a). The plaintiffs do not contend that the restrictions on post-retirement employment contained in the plan, either before or after the 1998 amendment, violate these restrictions. Instead, they assert that the amendment, which expanded the scope of disqualifying employment, violated the anti-cutback rule of § 1054(g). We review de novo the district court's decision to grant judgment on the pleadings in favor of the Fund. *See Velasco v. Ill. Dept. of Human Servs.*, 246 F.3d 1010, 1016 (7th Cir.2001).

A. Plan Amendments Under 29 U.S.C. § 1054(g)

Plan amendments are permitted under ERISA, *see* 29 U.S.C. § 1102(b)(3), but an amendment may not decrease

benefits that have already accrued. *See* LANGBEIN & WOLK, *supra* at 160. According to paragraph (1) of the anti-cutback rule:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

29 U.S.C. § 1054(g)(1); ERISA § 204(g)(1).[3] "Accrued benefit" is defined under ERISA as "the individual's accrued benefit determined under the plan . . . expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. § 1002(23). This definition has been interpreted to include retirement benefits and to exclude "ancillary benefits not directly related to retirement benefits" like insurance or disability benefits, *see* 26 C.F.R. 1.411(a)-7; *Hickey*, 980 F.2d at 468, and some courts, relying on this definition, have held that early retirement benefits were likewise excluded. *See Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1359-60 (7th Cir.1993), *overruled by Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1036 (7th Cir.1996); *Bencivenga v. Western Penn. Teamsters and Employees Pension Fund*, 763 F.2d 574, 577-78 (3d Cir.1985).

Paragraph (2) of § 1054(g), added by the Retirement Equity Act of 1984, P.L. 98-397, makes clear, however, that early retirement benefits are within the protection of the anti-cutback rule. Under that new provision, the test is not whether the amendment decreases "accrued benefits," but

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[3] The two stated exceptions relate to cases of "substantial business hardship" (29 U.S.C. § 1082(c)(8)) and terminated multiemployer plans (29 U.S.C. § 1441). The Fund does not assert that either exception applies.

rather whether the amendment "has the effect of--eliminating or reducing" early retirement benefits attributable to service before the amendment:

> For purposes of paragraph (1), a plan amendment which has the effect of—
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . .

29 U.S.C. § 1054(g)(2); ERISA § 204(g)(2); *see Ahng,* 96 F.3d at 1036; *Arndt v. Security Bank S.S.B. Employees' Pension Plan,* 182 F.3d 538, 540-41 (7th Cir.1999).[4] There is no question that the benefits at issue here are "attributable to service before the amendment" because the plaintiffs had already retired when the plan was amended. The only question, then, is whether the 1998 plan amendment "has the effect of—eliminating or reducing" the plaintiffs' early retirement benefit.

Before the amendment, plaintiffs had the right under the plan to work as construction supervisors and continue to receive their monthly benefit payments. When disqualifying employment was redefined to include work "in *any capacity* in the construction industry (either as a union or non-union

[4] For simplicity, we will refer to the plaintiffs' benefit as an early retirement benefit, without intending any substantive distinction between that term and "retirement-type subsidies." (On the difference between the terms, see *Arndt*, 182 F.3d at 542; DAN M. MCGILL & DONALD S. GRUBBS, JR., FUNDAMENTALS OF PRIVATE PENSIONS, at 131-35 (Pension Research Council) (6th ed.1989), *reprinted in* LANGBEIN & WOLK, *supra,* at 447-48.)

construction worker)," and when the Fund applied that definition to supervisory work, the plaintiffs lost their right to work as construction supervisors while collecting benefits.

We conclude that plaintiffs' loss of the option of working as construction supervisors was a reduction of their early retirement benefits within the meaning of § 1054(g)(2). A participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit "reduces" the benefit just as surely as a decrease in the size of the monthly benefit payment. We have not before interpreted the prohibition in the anti-cutback rule as limited to amendments that reduce the amount of the periodic payment, and we find nothing in the language of the rule that suggests such an interpretation. In *Ahng*, for example, we held that the plaintiffs had stated a claim for violation of § 1054(g) when they alleged that a plan amendment changed the deadline by which the employee must retire in order to receive supplemental early retirement benefits. 96 F.3d at 1036-37; *see also Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir.2000) (plan amendment that changed eligibility requirements for early retirement benefits violated § 1054(g)). Similarly, in *Michael v. Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1027-28 (9th Cir.2001), the Ninth Circuit held that an amendment that eliminated the plan's "no-offset rule," which had allowed a participant to receive full early retirement benefits without regard to the amount he already received upon previous retirement, violated § 1054(g) even though the amendment increased the plaintiff's monthly benefit payment. *Cf. Hickey*, 980 F.2d at 468 (7th Cir.1992) (plan amendment that eliminated the participant's right to cost-of-living adjustments violated the anti-cutback rule).

The Fund argues that these cases are distinguishable because a change in the eligibility requirements, as in *Ahng* for example, differs from a change in the conditions triggering suspension of benefit payments in that the former

permanently reduces benefits or eliminates certain participants' rights to benefits, whereas a suspension is temporary. We find the distinction unconvincing. Although with a suspension the interruption in benefit payments is temporary, the retiree never recovers the payments lost during the employment period. The amendment thus "eliminates" monthly benefit payments for participants who take certain jobs after retirement and "reduces" the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues. Plaintiffs lost a valuable right they had earned before the amendment—the right to continue to work in the industry while receiving monthly benefit payments—and that loss was permanent.[5] In our judgment, this was a reduction of early retirement benefits within the plain meaning of § 1054(g)(2).[6]

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[5] We respectfully believe that our dissenting colleague, by describing post-retirement income as a "bonus," mischaracterizes and underestimates the value of this right to plan participants, who were entitled to count on that pay to supplement their pension. There are other sources of such income, but compensating for lost income is more difficult the closer one is to retirement (or as here, early retirement). Amendments that restrict post-retirement employment most harshly affect those nearing retirement and especially those who have already retired, who have foregone other income-producing options which require long-term planning (such as taking re-training classes or fortifying savings and investment accounts). In this way, the amendment's effect in this case is like any reduction of benefits attributable to service already performed—it disproportionately affects those with greater service.

[6] The Fund also asserts that the amendment was necessary to curb the practice of "double-dipping," which it claims was depleting fund assets. We note that the pre-amended plan already provided for suspension of benefits if the retiree resumed work in jobs for which contributions were made to the Fund, so it does not appear that the amendment was aimed at "double-dipping" in the sense of preventing a participant from accruing additional benefits while drawing a pension. In any event, the anti-cutback rule does not prohibit the Fund from curbing certain reemployment prospectively, that is, by using the new definition of disqualifying employment to suspend the portion of the benefit payment

B. *Spacek v. Maritime Association*

The Fund points out, however, that "suspensions" are not identified along with the prohibitions against decreases, reductions, and elimination of benefits in the anti-cutback rule. The Fund relies on *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir.1998), in which the Fifth Circuit concluded that an amendment like the one in this case did not violate the anti-cutback rule because it concerned a "suspension" and not a "reduction" in benefits.[7] The Fifth Circuit supported its conclusion with: (1) an examination of the use of the two terms under the statute and related regulations; (2) the legislative history of the Retirement Equity Act; and (3) a

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attributable to service after the amendment. *Cf.* H.R.Rep. No. 98-655, Pt. 2 at 26-27 (1984); S.Rep. No. 98-575, at 29, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2575. But there is no question that at the time of plaintiffs' retirement, the plan permitted the very practice that the Fund now disparages—working as construction supervisors while receiving benefits. We can see no basis for inferring that Congress intended to exclude from the anti-cutback rule amendments based on claims of financial circumstances that fall short of the two exceptions identified in § 1054(g)—for cases of substantial business hardship and for terminated plans. *See Central States Southeast and Southwest Areas Pension Fund v. Bellmont Trucking Co.*, 788 F.2d 428, 433 (7th Cir.1986) ("'the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.'") (quoting *In re Cash Currency Exchange*, 762 F.2d 542, 552 (7th Cir.1985)). The anti-cutback rule, by protecting benefits attributable to service already performed, assures that the relatively greater effect on retirees of any change is adequately weighed when determining how to deal with financial contingencies.

[7] The Sixth Circuit, in *Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir.1995), also stated that § 1054(g) did not apply to an amendment allegedly expanding restrictions on post-retirement employment because a "suspension" was not a "reduction or elimination" of benefits. This statement, however, was dicta, because the court held that the plaintiff would have lost even under the pre-amendment version of the plan. *Id.* Moreover, the court did not support its conclusion with any analysis, so the opinion is not helpful to our task.

Treasury regulation concerning the effect of suspensions on "accrued benefits." We respectfully conclude, however, that the Fifth Circuit's arguments do not support its conclusion.

1. Suspensions and reductions under ERISA.

In *Spacek*, the court noted that "[t]hroughout the statute and corresponding regulations, the concepts of reduction of benefits and suspension of benefit payments are used in distinct ways, often within a single provision." 134 F.3d at 288-89 (citing 29 U.S.C. §§ 1441(a), 1341a(d) & 1342(d)(1)(A)(v); 29 C.F.R. § 2520.104b-4(a)(1)(iii)). From this the court reasoned that to interpret the prohibition in the anti-cutback rule against amendments that reduce benefits as applying to suspensions would "make the word 'suspension' redundant in all of these statutory provisions and interpretive regulations." *Spacek*, 134 F.3d at 289. This redundancy, according to *Spacek*, would violate the canon of statutory construction that every word in a statute must be given meaning. *Id.*

We disagree with the inference that *Spacek* draws from the various provisions that refer to both reductions and suspensions. Our interpretation of the anti-cutback rule does not suggest that *all* suspensions are "reductions" (or vice versa), only that *if* the suspension is pursuant to an amendment that reduces benefits (attributable to service before the amendment), then it is a reduction within the anti-cutback rule. This interpretation does not render the word "suspension" in the other provisions redundant.

For example, *Spacek* relies on various provisions in Title IV of ERISA (relating to financially troubled and terminated plans) that refer to both "reduction of benefits" and "suspension of benefit payments"; according to *Spacek*, to avoid redundancy, the former phrase must be construed as excluding the latter. *Id.* But *Spacek*'s identification of the two relevant phrases is too narrow; to the extent the Title IV

provisions identify two separate categories, they are *amendments that reduce benefits* on the one hand, and *suspension of benefit payments*, on the other. Section 1441, governing plan terminations, is typical:

> (a) Amendment of plan by plan sponsor to reduce benefits, and suspension of benefit payments
>
> Notwithstanding sections 1053 and 1054 of this title, the plan sponsor of a terminated multiemployer plan to which section 1341a(d) of this title applies shall *amend the plan to reduce benefits,* and shall *suspend benefit payments,* as required by this section.

29 U.S.C. § 1441(a) (emphasis added)[8]; *see also* 29 U.S.C. § 1425(a)(1) & 26 U.S.C. § 418D(a)(1) (plans in reorganization may amend the plan to reduce benefits); 29 U.S.C. § 1426(a) & 26 U.S.C. § 418E(a) (insolvent plans may suspend benefit payments); 29 U.S.C. § 1053(a)(3)(E)(ii) & 26 U.S.C. § 411(a)(3)(F) (exception to forfeiture rule for amendments that reduce benefits under §§ 1441 or 1425, and suspension of benefit payments under §§ 1441 and 1426). Because the latter category (*suspension of benefit payments*) includes suspensions *not* according to any amendment, as in the case of insolvent plans, for example, it is not rendered superfluous by interpreting the amendment in this case as falling into the former category (*amendments that reduce benefits*).[9]

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[8] The reference to reduction and suspension in § 1341a, also relied upon by the court in *Spacek, see* 134 F.3d at 289, is derivative of section 1441, directing plan sponsors to "reduce benefits and suspend benefit payments in accordance with section 1441 of this title." 29 U.S.C. § 1341a(d).

[9] The reference to reduction and suspension in 29 U.S.C. § 1301(a)(8), which defines "non-forfeitable benefit" in the context of termination insurance, is consistent with this analysis. It states that the definition applies "whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence of any condition, or operation of this chapter or the Internal Revenue Code of 1986." A

In other words, even crediting the reliability of any inference about the anti-cutback rule that can be drawn from the use of these phrases in various provisions relating to terminated or troubled plans, the most we can infer is that a suspension of benefit payments not falling into the first category—amendments that reduce benefits--should be excluded from the anti-cutback rule. But other than in the case of insolvent or terminated plans, an administrator's authority to suspend benefits must come from the plan. And as we noted before, no one is disputing that the suspension in this case would be proper if it were contained in the original plan. It is the propriety of the *amendment* to the plan that is at issue in this case, and not the suspension itself, and therefore we cannot infer from the distinction made in Title IV between suspensions of benefit payments and amendments that reduce benefits that the amendment in this case is beyond the anti-cutback rule.[10]

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suspension of benefits in the case of an insolvent plan would be a suspension "by operation of this chapter" and not a reduction "by plan amendment."

[10] The Fifth Circuit also relies on a Department of Labor regulation, 29 C.F.R. § 2520.104b-4(a)(1)(iii), which requires notice of plan provisions "under which the present benefit payment may be reduced, changed, terminated, forfeited or suspended." Under the Fifth Circuit's reasoning, this list of overlapping terms creates a whole host of redundancy problems unless we construe the list as creating mutually exclusive categories. But there is no need to do so to avoid redundancy because the term "suspended" has application outside the scope of the broader terms. For example, a suspension of benefits could be a forfeiture, but not always—as when the suspension is according to provisions in the plan meeting the requirements for post-retirement employment in § 29 U.S.C. 1053(a)(3)(B). Because a suspension will not always be a forfeiture, identification of the two concepts separately is not redundant, and there is no need to interpret the concept of forfeiture as excluding suspensions. The same is true for suspensions and reductions: a suspension will not always be a reduction in benefits, as when, for example, the suspension is according to the plan as originally conceived. The reference to suspensions in the notice regulation is therefore not rendered redundant by interpreting the amendment in this case as reducing benefits. (For the same reason, there is no redundancy in identifying suspensions and reductions separately in 29 U.S.C. § 1342 (trustee of terminated plan may "reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan . . .").)

We do not view the omission of a specific reference to suspensions in the anti-cutback rule as an oversight, but as unnecessary. Adding a reference to suspensions in § 1054(g)(1) (*e.g.*, "The accrued benefit of a participant under a plan may not be decreased [*or suspended*] by an amendment of the plan") or § 1054(g)(2) (*e.g.*, "a plan amendment which has the effect of . . . eliminating[,] reducing[, or *suspending*] an early retirement benefit . . ."), would be awkward and perhaps overbroad; it is not the *suspension* of benefit payments that offends the anti-cutback rule, but the change (to the detriment of the participant) in the conditions triggering the suspension, and this concept is adequately captured by the prohibition against amendments that reduce benefits.

2. Legislative history of the Retirement Equity Act.

The Fund, again relying on *Spacek*, also points to the legislative history of the Retirement Equity Act of 1984, which added paragraph (2)—the provision concerning amendments that reduce or eliminate early retirement benefits—to § 1054(g). *See Spacek*, 134 F.3d at 289-90. *Spacek* found instructive the following comment made by Representative William Clay during the final House debates on the Retirement Equity Act:

> Nor do those provisions in any way apply to or affect the provisions of ERISA section 203(a)(3)(B) and code section 411(a)(3)(B) relating to the suspension of benefits for postretirement employment, including the

> authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.

Spacek, 134 F.3d at 289 (quoting 130 Cong. Rec. 23,487 (1984)). The Fifth Circuit concluded that Representative Clay's remark means that the anti-cutback rule in § 1054(g) does not limit the power of the plan to amend the plan to expand the restrictions on post-retirement employment. *See Spacek*, 134 F.3d at 289-90.

We find Representative Clay's remark ambiguous at best on the question of whether amendments concerning suspensions for disqualifying employment are outside the coverage of § 1054(g).[11] But even if Representative Clay's understanding of the anti-cutback rule were consistent with the Fifth Circuit's—that suspensions upon disqualifying re-employment represent an additional exception to § 1054(g)—we find nothing in the legislative history to indicate that anyone else in Congress shared the understanding attributed to Representative Clay by the Fifth Circuit. The parties have not identified, and we have been unable to find, any further reference in the legislative history of the Retirement Equity Act to the exception for suspensions that the Fifth Circuit infers from Representative Clay's

[11] It is not self-evident that Representative Clay's reference to "stricter rules" means rules that are "more strict than before the plan amendment." It could also mean that the new provision was not intended to affect the existing authorization for multiemployer plans to impose rules relating to suspensions of early retirement benefits that are stricter than those authorized for benefits commencing at normal retirement age, which must conform to the limits in § 203(a)(3)(B). *See* 29 C.F.R. § 2530.203-3(a). Similarly, Representative Clay's comment that the new provision will not affect the ERISA provisions that impose limits on the conditions a plan may place on post-retirement employment could mean simply that the new provision does not address those conditions substantively; it does not necessarily mean he believed that an amendment changing those conditions was outside the anti-cutback rule.

remarks.[12] The absence of any additional support in the legislative history suggests to us that the Fifth Circuit gave undue weight to the statement of Representative Clay, which (as interpreted by the Fifth Circuit) is at odds with the straightforward language of the statute. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 122 S.Ct. 941, 953-54, 151 L.Ed.2d 908 (2002) (rejecting interpretation contained in the floor statements of the statute's sponsors); *Monterey Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 743 F.2d 589, 596 (7th Cir.1984) (same); *Alex v. City of Chicago*, 29 F.3d 1235, 1239 n. 3 (7th Cir.1994) ("[I]solated remarks of individual legislators, . . . [can]not be used to find ambiguity, or contrary intent, in statutory language that, with respect to a case in hand, is clear on its own terms without rendering nugatory the 'plain meaning' canon of construction.").[13] Accordingly, we conclude that Representative Clay's remarks cannot be used to support an exception to the anti-cutback rule for amendments that expand disqualifying employment.

3. Treasury Regulation 26 C.F.R. § 1.411(c)-1(f).

The court in *Spacek* also found support in 26 C.F.R. § 1.411(c)-1(f), a Treasury Department regulation concerning the allocation of accrued benefits between employer and employee contributions. By way of background, the court first noted that the term "accrued benefit" means the employees' benefit as accrued under the plan, expressed in

[12] By contrast, both the House and the Senate Reports discuss the two exclusions specifically identified in § 1054(g)—for cases of substantial business hardship and for terminated multi-employer plans. *See* H.R.Rep. No. 98-655, pt. 2, at 27 (1984); S.Rep. No. 98-575, at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

[13] Moreover, Representative Clay's statement, on August 9, 1984, was made three days after the Senate had passed the bill, on August 6, 1984, see P.L. 98-397, further undermining its reliability as evidence of Congress's intent. *See Sigmon Coal Co.*, 122 S.Ct. at 954 n. 15; *Monterey Coal Co.*, 743 F.2d at 597.

the form of "an annual benefit commencing at normal retirement age," 29 U.S.C. § 1002(23),[14] or, for early retirement benefits, the actuarial equivalent of the benefit commencing at normal retirement age. *See Spacek,* 134 F.3d at 290 (citing 29 U.S.C. § 1054(c)(3); 26 C.F.R. § 1.411(c)-1(e)).[15] The Treasury regulation relied upon by *Spacek,* 26 C.F.R. § 1.411(c)-1(f)(1), states that in calculating the actuarial equivalent of an accrued benefit, "[n]o adjustment . . . is required on account of any suspension of benefits" if the suspension is permitted under ERISA § 203(a)(3)(B)—the section dealing with restrictions on post-retirement employment.[16] According to the Fifth Circuit, "because the reduction in total benefits paid over the lifetime of the plan participant as a result of the suspension need not be accounted for actuarially in computing the participant's accrued benefit," an amendment "authorizing such a suspension does not serve to decrease the participant's accrued benefits, and thus cannot violate § 1054(g)." 134 F.3d at 291.

This reasoning, however, is inconsistent with the language of paragraph (2) of § 1054(g), which provides that an amendment that has the effect of eliminating or reducing early retirement benefits shall, for purposes of § 1054(g), "be *treated* as reducing accrued benefits." 29 U.S.C.

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[14] The term "accrued benefit" means[,] in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age . . . . 29 U.S.C. § 1002(23).

[15] [I]f an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, . . . the employee's accrued benefit . . . shall be the actuarial equivalent of such benefit . . . . 29 U.S.C. § 1054(c)(3).

[16] No adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B) . . . . 26 C.F.R. § 1.411(c)-1(f)(1).

§ 1054(g)(2), ERISA § 204(g)(2) (emphasis added); *see Ahng*, 96 F.3d at 1036; *Bellas*, 221 F.3d at 523. Whether a benefit is "accrued" for other purposes under ERISA is irrelevant for purposes of § 1054(g)(2). *See Costantino v. TRW, Inc.*, 13 F.3d 969, 979-80 (6th Cir.1994) ("There is no inconsistency between Defendant's claim that the definition of 'accrued benefits' excludes [retirement-type] subsidies, and the [Retirement Equity Act's] strategy of protecting subsidies by treating them as 'accrued benefits' in several provisions."); *Bellas*, 221 F.3d at 523 ("While the definition of an accrued benefit has not been modified, Congress did modify section 204(g) in 1984 to the end that early retirement benefits and retirement-type subsidies were defined as being accrued for purposes of ERISA's anti-cutback provisions."). In fact, it was on this basis that we overruled our earlier decision in *Meredith v. Allsteel, Inc.*, 11 F.3d 1354, 1359-60 (7th Cir.1993), which held that an amendment reducing early retirement benefits did not violate § 1054(g) because the benefits were not accrued benefits as defined under 29 U.S.C. § 1002(23). *See Ahng*, 96 F.3d at 1036-37. The portion of the regulation relied upon by the court in *Spacek*, like the general definition of accrued benefits relied on in *Meredith*, is simply irrelevant to our determination of the scope of § 1054(g)(2), which treats amendments that reduce early retirement benefits as reducing accrued benefits.

The Fifth Circuit reasoned, however, that because the amendment would not decrease "accrued benefits," then the amendment could not violate the anti- cutback rule as applied to full retirement benefits, because for those benefits, the prohibition is limited to amendments that decrease "accrued benefits." *See* 134 F.3d at 291. According to *Spacek*, applying the anti-cutback rule to amendments governing suspension of early retirement benefits would therefore give early retirement benefits greater protection than full retirement benefits, which is contrary to Congress's intent that early retirement benefits receive the same protection as

full retirement benefits. *Id.* But *Spacek's* observation about Congress's intent cuts both ways. The question is, same as what? Other than perhaps the remarks of Representative Clay (reliance on which, as we just discussed, is problematic), there is nothing in the legislative history of the Retirement Equity Act to suggest that Congress had any specific understanding about whether amendments affecting suspensions of full or early retirement benefits would be covered. And we disagree with *Spacek's* key premise—that for full retirement benefits, 26 C.F.R. § 1.411(c)-1(f) means that an amendment expanding the conditions triggering a suspension would not be covered by the anti-cutback rule.

As *Spacek* points out, the regulation instructs that in calculating the accrued benefit, no actuarial adjustment need be made to account for the decrease in total benefits paid as a result of the suspension. *See* 134 F.3d at 290. This is consistent with ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B), which states that a suspension for certain post-retirement employment is not a forfeiture. But it does not necessarily follow that, because no actuarial adjustment is required, an amendment concerning suspensions cannot decrease accrued benefits. To say that a *suspension* is not a forfeiture (or does not decrease accrued benefits) is not the same as saying that a *change* in the rules governing suspensions cannot decrease accrued benefits. In other words, we can conclude from the regulation that a pre-existing plan provision suspending benefit payments would not decrease accrued benefits; the regulation says nothing, however, about a *change* in the rules regarding suspensions. And if we view "accrued benefits" as including the conditions on receiving those benefits, then the *amendment,* by increasing those conditions, decreases accrued benefits. *Spacek's* logic therefore depends on interpreting the term "accrued benefits" as including only the periodic payment, but excluding the conditions affecting the participant's ability to receive that amount. There is nothing in the statutory definition that compels this interpretation, and

we are persuaded that our interpretation is closer to ERISA's purpose of protecting anticipated benefits. *See generally Hickey*, 980 F.2d at 468 ("ERISA protects the benefits described in the Plan by ensuring that, if a pensioner is promised a benefit and fulfills the conditions required to receive it, the pensioner will actually receive the described and promised benefit."); LANGBEIN & WOLK, *supra*, at 121-22.

Another regulation, moreover, supports our conclusion that *Spacek's* construction is too narrow. That regulation, 26 C.F.R. § 1.411(d)-4, which contains the Treasury Department's interpretation of 26 U.S.C. § 411(d)(6) (the counterpart of the anti-cutback rule in the Internal Revenue Code), interprets the anti-cutback rule as applying to amendments that impose further restrictions or increase the conditions affecting benefits that have already accrued. The regulation begins by defining "section 411(d)(6) protected benefits" as including any benefit that is described in 26 U.S.C. §§ 411(d)(6)(A) & (B) (the counterpart in the Internal Revenue Code of the anti-cutback rule in 29 U.S.C. § 1054(g)). 26 C.F.R. § 1-411(d)-4 Q & A-1. It then provides that:

> The addition of employer discretion or objective conditions with respect to a section 411(d)(6) protected benefit that has already accrued violates section 411(d)(6). Also, the addition of conditions (whether or not objective) or any change to existing conditions with respect to section 411(d)(6) protected benefits that results in any further restriction violates section 411(d)(6).

26 C.F.R. 1.411(d)-4 Q & A-7.

The section of the anti-cutback rule dealing with early retirement benefits does not limit the prohibition to a decrease in "accrued benefits," but rather says that an amendment that "has the effect of—eliminating or reducing" benefits will

"be treated as reducing accrued benefits." 29 U.S.C. § 1054(g)(2). Reading this language to include an amendment increasing conditions is straightforward, and we decline to abandon this plain reading in favor of the Fifth Circuit's interpretation of the term "accrued benefits," which is neither compelled by the statutory definition nor supported by legislative history or other persuasive authority.[17]

III. CONCLUSION

Nothing in ERISA, the legislative history of the Retirement Equity Act, or the Treasury regulation relied upon by the

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[17] One final point: in conducting our research we encountered a sentence in the current Internal Revenue Manual addressing the question posed in this case. The manual states that "[a]n amendment that reduces I.R.C. 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate I.R.C. 411(d)(6)." Internal Revenue Manual 4.72.14.3.5.3(7) (available on WESTLAW RIA-IRM database). This statement does not settle the matter, however. An agency manual is generally entitled only to whatever deference is due based on its persuasiveness. *United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Matz v. Household Int'l Tax Reduction Inv. Plan*, 265 F.3d 572, 575 (7th Cir.2001). The single statement in the manual does not tell us anything about the thoroughness of the agency's analysis or the validity of its reasoning, and we have no basis to conclude that it represents a long-standing agency interpretation. *Compare Barnhart v. Walton*, ___ U.S. ___, ___, 122 S.Ct. 1265, 1270, 152 L.Ed.2d 330 (2002). Furthermore, the manual, although it supports the outcome in *Spacek*, does not support its logic. *Spacek* reasoned that amendments affecting suspensions cannot violate the anti-cutback rule because they cannot reduce accrued benefits. 134 F.3d at 291. The premise of the statement in the manual, however, is that such an amendment "reduces I.R.C. 411(d)(6) protected benefits." To characterize an amendment as "reducing I.R.C. 411(d)(6) protected benefits" is to admit that the amendment is within the anti-cutback rule of I.R.C. § 411(d)(6) (and its counterpart in 29 U.S.C. § 1054(g)). The manual's conclusion that such an amendment does not violate the anti-cutback rule is at odds with the plain language of the statute, even as interpreted by *Spacek*, and without any explanation of its rationale, must be rejected as unpersuasive.

court in *Spacek* persuades us to depart from our conclusion that 29 U.S.C. § 1054(g) unambiguously applies to the amendment in this case, which reduced plaintiffs' early retirement benefits by expanding the conditions triggering a suspension of benefit payments. Because our interpretation of § 1054(g) resolves this appeal, we need not reach the plaintiffs' alternative argument that the Fund trustees' interpretation of the amendment's definition of disqualifying employment to include supervisory work was arbitrary and capricious. The judgment of the district court is REVERSED, and the case is REMANDED for further proceedings.

CUDAHY, *Circuit Judge*, dissenting.

Judge Williams for the majority has labored with great skill and ingenuity to overcome the efforts of Chief Judge Caroline Dineen King for a Fifth Circuit panel that came out the other way. *See Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir.1998). Though Judge Williams has put as persuasive a face as may be possible on the majority's position, I still find *Spacek* quite compelling. *Spacek*, it seems to me, presents straightforward and plausible arguments, not susceptible to rebuttal by the sometimes tortured contentions of the majority.

The first pillar supporting the outcome in *Spacek* is the absence of the word "suspend" or its variants from 29 U.S.C. § 1054(g), the anti-cutback rule.[1] Yet "suspend" or its variants appear side-by-side with "reduce" or its variants in numerous other sections of ERISA. If, as the majority argues, the concept of reduction includes suspension, then the use of "suspend" or its variants, in addition to "reduce" or its variants, in many other ERISA sections is redundant. There is no doubt that the drafters knew how to include the concept of suspension, in contrast to that of reduction, when they wanted to do so. I find this plain meaning argument to be quite convincing.

The majority attempts to rebut this argument with two points. First, it seems to say that a "suspension" is really a "reduction" because over time a "suspension" of the receipt

[1] Section 1054(g)(2) also prohibits the *elimination* of benefits but the majority, and the parties on appeal, mainly deal with the prohibition against the *reduction* of benefits. Thus, I restrict my analysis to whether a suspension is a reduction of benefits. In any event, there is no elimination of benefits in this case. While it is true that a plan participant will not receive pension payments when he or she is engaged in disqualifying work, the entitlement to pension payments is only temporarily lost and not eliminated. The participant will receive pension payments again when the disqualifying work is finished.

of a benefit reduces the economic value of the total benefits received. Op. at 806. Of course, there is an economic loss from a suspension; if there were none, there would be no lawsuit. But, that does not mean that, as used in ERISA, a "suspension" is exactly equivalent to a "reduction" or is included within it. From the point of view of the recipient on the facts before us, the suspension of pension payments does not reduce the recipient's current income because the temporarily lost pension income is replaced by earned income derived, as was the pension, from the very same construction industry. This elimination of "double-dipping" from the construction industry's pockets seems substantially more equitable, and is certainly less burdensome to the pension recipient, than would be a reduction in the amount of the benefit unsupplemented by earned income. Hence, the broadening of the ban on "double-dipping" seems not inequitable.

Second, the majority attempts to dismiss the argument from redundancy based on the numerous ERISA provisions that contain both the words "reduction" and "suspension" by distinguishing those provisions as involving matters other than an amendment purporting to diminish benefits. Op. at 807-808. Thus, the majority apparently concludes that if a suspension is pursuant to an amendment that diminishes benefits, then the suspension *is* a reduction of benefits. Op. at 807-808. On the other hand, if a suspension is not pursuant to such an amendment, then, the majority concludes, it *is not* a reduction of benefits. *Id.* I do not follow this logic. While there may be more than one means of invoking a suspension, what constitutes a suspension--the meaning or definition of a suspension--should not change because the suspension was achieved by one method instead of by another method.

The majority's subsequent argument that § 1054(g) concerns only amendments and thus it only bars suspensions pursuant to an amendment, Op. at 809, only makes sense if a suspension is a reduction of benefits. But, beside the

majority's ipse dixit, there is nothing to indicate that a suspension of benefits is a reduction of benefits as those terms are used in ERISA. Rather, as the analysis of Treasury Regulation 26 C.F.R. § 1.411(c)-1(f), discussed *infra*, concludes, a suspension is not a reduction of benefits based on ERISA's mode of calculating accrued benefits.

The legislative history involving the clear comments of Representative Clay firmly supports the interpretation based on plain meaning. The effort of the majority to explain away this comment is unconvincing. The comment appears to reflect an understanding at the time of the adoption of the anti-cutback rule that it not apply to adjustments made by the plan (perhaps in the interest of the plan's financial integrity) to the rules involving suspension of benefits in the event of re-employment in the construction industry. With respect to the arguments of the majority depreciating the use of legislative history in general, these arguments become less weighty in the case of legislative history that fits so closely with the interpretation founded on plain meaning.

The plain meaning is also supported by the Internal Revenue Manual described by the majority in its footnote 17. Again, this bit of authority fits neatly into the interpretation derived from plain meaning. It is, therefore, hard to explain away.

That *Spacek*'s interpretation reflects the plain meaning of the statute is supported by the outcome in *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir.1995). In *Whisman*, the appellant had qualified for a "'30-and-Out' pension benefit, which [was] available to participants with thirty years of service, regardless of age." *Id.* at 1143. He received $1,000 per month under the "30-and-Out" provision until he began working for the United States Postal Service in 1986, at which time, his pension benefit was suspended under the Plan's re-employment provision. *Id.* The Sixth Circuit held that the re-employment provision, which suspends early

retirement benefits if the participant is engaged in prohibited employment, was not contrary to the law. *Id.* at 1146-47 (citing *Gardner v. Central States, Southeast & Southwest Areas Pension Fund*, No. 93-3070, 1993 WL 533540 (6th Cir. Dec.21, 1993) (per curiam)). The court then dealt with Whisman's argument invoking the anti-cutback rule of ERISA.

> Whisman counters that *Gardner* is inapplicable because at the time Whisman applied and qualified for pension benefits, [the reemployment provision], adopted in 1987, was not in effect. According to Whisman, the application of the amended reemployment provision violates the principle of *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir.1994). We disagree. In *Costantino*, this Court held that a plan's attempt to eliminate early retirement subsidies for retirees that had already qualified for the subsidy prior to plan amendment violates the anticutback rules of ERISA and the Tax Code. *Costantino* is based upon an application and enforcement of section 204(g) of ERISA, 29 U.S.C. § 1054(g), which prohibits employers from amending their pension plan to decrease or eliminate early retirement benefits or retirement type subsidies. Even assuming that the "30-and-Out" benefit contains an early retirement subsidy, Whisman's argument is unpersuasive, because § 1054(g) and *Costantino* involve *a reduction or elimination of accrued benefits and retirement-type subsidies, not a suspension,* as is the case here.

Whisman, 55 F.3d at 1147 (emphasis added and footnote omitted). The court went on to conclude that Whisman would have lost even under the unamended plan. *Id.* While the majority dismisses *Whisman* as reaching its conclusion without analysis, perhaps the *Whisman* court thought that its conclusion was obvious from the plain meaning of § 1054(g).

The majority also seeks to rebut *Spacek*'s reliance on Treasury Regulation 26 C.F.R. § 1.411(c)-1(f) to establish that *normal* retirement benefits are not protected against suspension by amendment. The point *Spacek* makes is that, if normal retirement benefits are not protected, it is most unlikely that early retirement benefits would be protected.

Initially, to gain some perspective on the status of early retirement benefits in relation to normal retirement benefits, one should recognize that early retirees—here only 39 years old—would be much more likely to go back to work in construction than people normally retiring in their sixties. Hence, it would not be at all surprising that "double-dipping" by early retirees would, perhaps for reasons of the financial integrity of the plan, be dealt with more severely (and certainly not less severely) than would re-employment in the industry by workers retiring at a normal (and relatively advanced) age.[2] It would appear more likely that normal retirees would be allowed to retain their pension payments than would early retirees.[3] So one might logically expect

[2] The exceptions in the anti-cutback rule, permitting an amendment that decreases accrued benefits in the cases of "substantial business hardship" or termination of a pension plan, deal more with business problems facing the firm sponsoring the plan and not the internal financial integrity of a plan that might be affected by "double-dipping" even in good economic times. Because suspensions do not decrease accrued benefits, *see infra* Op. at 816, ERISA allows plan administrators more flexibility in adjusting the provisions for suspensions to maintain the financial integrity of pension plans. Under the majority's approach that would limit the availability of adjustments in suspensions to "substantial business hardship" or termination of a plan, the plan administrator loses such flexibility.

[3] The significance of age in the policy of retirement systems towards retirees' receipt of earnings is exemplified by the rules of the Social Security system. Retired persons, aged 65 to 70, lose their benefits if their earned income exceeds a stipulated amount, but, after they reach age 70, they are allowed to keep all their earnings in addition to their benefits. *See* Soc. Sec. Admin. Pub. No. 05-10069 (March 2002). One may surmise that pensioners are more likely to have significant earnings before age 70 than after.

employment restrictions on early retirees to be more onerous than those on normal retirees.

The Retirement Equity Act (REA), however, added the language of § 1054(g)(2), and, as *Spacek* states, "The legislative history of the REA indicates that the fundamental purpose behind the addition of paragraph (2) was to afford early retirement benefits and retirement-type subsidies the same form of protection from reduction by amendment afforded to accrued benefits." I am therefore in accord with *Spacek* 's conclusion that, if an amendment, such as the one at issue here, would not violate § 1054(g) if it were applied to suspend fully accrued benefits, it plainly cannot violate § 1054(g) if applied to early retirement benefits. *Spacek*, in reaching that conclusion, starts with the proposition from the applicable treasury regulation that, "for the purposes of computing the actuarial equivalent of a retirement benefit available at normal retirement age, '[n]o adjustment of any accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B) of the Employment Retirement Income Security Act of 1974 [29 U.S.C. § 1053(a)(3)(B)].'" *Spacek*, 134 F.3d at 290 (quoting 26 C.F.R. § 1.411(c)-1(f)). Therefore, in figuring a plan participant's accrued benefit, where early retirement benefits are involved, the calculation of the accrued benefit need not account for the decrease in total benefits paid as a result of a suspension authorized by 29 U.S.C. § 1053(a)(3).

Spacek then notes the authorization under § 1053(a)(3)(B) of suspension of accrued benefits based on certain employment—as is the case here. At this point, *Spacek* goes on to conclude that an authorized suspension does not decrease accrued benefits. And, as earlier noted, to the extent that an

amendment would not violate the anti-cutback provision rule if applied to fully accrued benefits, such an amendment cannot, based on the demonstrated intent of Congress, violate the rule if applied to early retirement benefits. The logic here seems inescapable.

As far as I can divine, the majority's effort at refutation involves a simple attempt at bootstrapping. The majority says that the *Spacek* reasoning is inconsistent with the language of paragraph (2) of the anti-cutback rule, apparently because this provision requires that amendments that have the effect of eliminating or reducing early retirement benefits should be treated as reducing accrued benefits. Slip op. at 18. But, as has been demonstrated earlier, a "suspension" is not a "reduction" (although the majority would have it otherwise), and the alleged inconsistency therefore disappears. As far as I can determine, the remainder of the majority's argument involving accrued benefits continues to rely on the false equation of "suspension" with "reduction."

The majority also adds the point that, even though a suspension of benefit payments may not decrease accrued benefits (or become a forfeiture), a change in the rules governing suspensions may indeed decrease benefits. Slip op. at 20. This argument misses the mark because the provisions we are discussing are directed to what is permissible for *changes* in the plan. To change the rules governing suspensions is merely to create a suspension with a little different design than an earlier one. The rules addressing the consequences of invoking a suspension necessarily encompass changes leading to a new form of suspension.

The majority's reliance on 26 C.F.R. § 1.411(d)-4 interpreting 26 U.S.C. § 411(d)(6), an analogous anti-cutback rule in the Internal Revenue Code, is also unconvincing. Nothing in this regulation refers to a suspension or anything resembling a suspension. The majority seems to be arguing that the amendment under consideration here had something to do

with "increasing conditions." But there is no indication that anything in the cited regulation is relevant to the conditions of a suspension. Rather, the bar against "increasing conditions" appears to be a bar against increasing eligibility requirements for pension participation. *See* 26 C.F.R. § 1.411(d)-4 Q & A-6 (asking and answering whether a plan may "condition the availability of a section 411(d)(6) protected benefit on the satisfaction of objective conditions that are specifically set forth in the plan"). We have already held that a change in eligibility requirements could violate the anti-cutback rule. *See Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1036-37 (7th Cir. 1996) (so holding). But the Internal Revenue Manual discussed in footnote 17 of the majority opinion states unequivocally that an amendment pursuant to ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B), suspending benefits payments for periods of employment, as here, does not violate the anti-cutback rule of § 411(d)(6). The majority has nothing better to point out in refutation than a clumsy use of words in drafting some of the provisions of the manual. The intent of the manual provision, on the other hand, seems clear.

Spacek's analysis relies on straightforward interpretations of statutory and regulatory language. The majority seeks to refute it with implausible and unconvincing arguments that do violence to the clear intent of the drafters.

As to considerations of policy and equity, it is true that my analysis may result in defeating in some instances the expectations of the plan participants. But this seems acceptable if they withdraw from retirement and return to the workforce, later to place additional demands upon the plan. They suffer no loss of regular income and are merely deprived of a bonus in the form of a dual recovery at the expense of the construction industry. Meanwhile, the financial integrity of the plan may be affected by continuing to make retirement provisions for participants who have not really retired.

I therefore respectfully dissent.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

[Filed Aug. 9, 2000]

Case Number: 99-1388

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,

v.

CENTRAL LABORERS' PENSION FUND

JUDGMENT IN A CIVIL CASE

☒ DECISION BY THE COURT. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant and against Plaintiffs.

ENTER this 9th day of August, 2000

/s/ John M. Waters
JOHN M. WATERS, CLERK

/s/ [Illegible]
BY: DEPUTY CLERK

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

Case Number: 99-1388

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.
Plaintiff,

vs.

CENTRAL LABORERS PENSION,
Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendant and against Plaintiffs.

In compliance with the view of the Court that a motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is more appropriate than summary judgment where there are no factual issues created by the pleadings, before the Court are cross-motions of the parties for judgment on the pleadings. To the extent either party has presented matters outside the pleadings, the motion of that party is treated as one for summary judgment. This is a two-pronged ERISA claim by Plaintiffs to recover service pension (early retirement) benefits which were suspended by Defendant, Central Laborers' Pension Fund[1] ("the Fund") when Plaintiffs became reemployed in the construction

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[1] The Fund is a multi-employer pension fund whose participants are primarily laborers in the construction industry.

industry in non-union supervisory positions. Plaintiffs claim that the suspension of their pension benefits was (1) in violation of section 204(g) of ERISA, 29 U.S.C. § 1054(g), known as the anti-cutback rule; and (2) that the determination by the Fund that the suspension of benefits was allowed by the 1998 Amendments to the Plan was arbitrary and capricious.

* * * *

BACKGROUND

The material facts are not in dispute. Plaintiff Thomas E. Heinz began his retirement on January 1, 1996, at age 39½ years; and Plaintiff Richard J. Schmitt, Jr. on December 1, 1996, at age 39. They both had applied for and received a 30 credit service pension pursuant to the terms of the Plan administered by the Fund. However, the Plan provided that if early retirees engage in "disqualifying employment" before reaching normal retirement age, pension benefits would be suspended. Under the Plan's provisions, employment that was considered "disqualifying employment" varied depending on the retiree's age at the time of the reemployment. At the time Plaintiffs began their retirement, the relevant Plan language was construed to allow retirees under age 60 to work 39 hours in the construction industry, including work in a supervisory position without such work being considered "disqualifying employment."

At the time of their retirement, the relevant plan language found in Plan section 6.7(b) defined "disqualifying employment" as follows:

> Employment with an employer in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker).

On October 1, 1998, Section 6.7(b) of the Plan was amended to read as follows:

> (b) For employees who initially retired prior to October 1, 1998, disqualifying employment shall be defined as follows:
>
> (1) Initially retired prior to the participant's 53rd birthday, Disqualifying Employment is either:
>
> (i) Employment with an Employer in any capacity in the construction industry (either as union or non-union construction worker).

Subsequent to the October 1, 1998 Amendments, upon being advised that Plaintiffs were each employed in a non-union supervisory capacity by their respective employers in the construction industry, the Fund suspended Plaintiffs' pension benefits effective February 1, 1999.

ANALYSIS

A. Anti-Cutback Theory

This prong of Plaintiffs' ERISA claim depends upon the application of the anti-cutback provisions of section 204(g) to the suspension of early retirement pension benefits. Defendant argues that this section does not apply to early retirement pension benefits, relying upon a 1994 decision of our Court of Appeals in *Meredith v. Allsteel, Incorporated*, 11 F.3d 1354 (7th Cir. 1994), holding that early retirement benefits were not "accrued benefits" within the meaning of ERISA and thus were not protected from reduction by section 204(g). Unfortunately for Defendant, approximately two years later, *Meredith* was overruled by *Ahng v. Allsteel*, 96 F.3d 1033 (7th Cir. 1996). The *Ahng* panel confessed that in deciding *Meredith*, the court had overlooked the effect of the 1984 Retirement Equality Act amendment to section

204(g). This 1984 amendment to section 204(g) expressly addressed the question of whether early retirement benefits were "accrued benefits" and reads as follows:

> (g) Decrease of accrued benefits through amendment of a plan
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of—
>
> (A) *eliminating or reducing an early retirement benefit* or a retirement-type subsidy (as defined by regulations), or
>
> (B) eliminating an optional form of benefits with respect to benefits attributable to service before this amendment *shall be treated as reducing an accrued benefit*. (emphasis added)

In conforming Seventh Circuit jurisprudence in this area to that of the majority of other circuit courts of appeals, the court held "that employees like plaintiffs here who complain about a cutback of early retirement benefits have stated a claim under section 204(g), as long as each employee satisfies (either before or after the plan amendment) the relevant eligibility requirements in place at the time of the amendment." *Id*. at 1035.

Faced with the compelling force of *Ahng*, Defendant seeks to distinguish *Ahng* by limiting its holding to cases where early retirement benefits are terminated or reduced, not suspended as they are in the case at bar. In support, Defendant relies upon the Fifth Circuit's opinion in *Spacek v. Maritime Association*, 134 F.3d 283 (5th Cir. 1998) (where the pension plan at issue provided that if an early retiree is

reemployed in the same industry prior to his normal retirement age, any early retirement pension benefits could be suspended). In *Spacek*, the Plan and its trustees suspended payment of Spacek's early retirement benefits pursuant to a plan amendment adopted after he retired that changed the definition of "employment in the industry" by removing the requirement that participant receive one credit hour before early retirement benefits would be subject to suspension for reemployment.

The Fifth Circuit decided that suspension of benefit payments was not covered by section 204(g). This conclusion was supported by examples in both the wording of the ERISA statute and corresponding regulations where the concepts of reduction or termination of benefits and suspension of benefit payments are used in distinct ways, often within a single provision. The Court finds this reasoning persuasive and logical since interpreting "reduction of benefits as including suspension of benefit payments would make the word 'suspension' redundant in all of these statutory provisions and interpretive regulations." *Id*. at 289. As observed in *Spacek*, this construction would be "contrary to the rule of statutory construction that each word must be given meaning (citation omitted)." *Id*. at 289.

The Fifth Circuit also found support for the distinction made between reduction of benefits and suspension of benefit payments in the legislative history of the Retirement Equity Act of 1984 (REA) which amended section 204(g) to expressly apply the anti cutback rule to early retirement benefits. The court concluded that "the legislative history of the REA indicates that the fundamental purpose behind the addition of paragraph (2) to section 1054(g) was to afford early retirement benefits and retirement-type subsidies the same form of protection from reduction by amendment afforded to accrued benefits. Although the Court is skeptical of this over reaching conclusion, the Court does subscribe to the view expressed in *Spacek* that the legislative history

supports a distinction between "reduction of benefits" and suspension of benefit payments. In that regard, the Court is struck by the fact that, unlike a reduction in benefits situation, where benefits are suspended, the suspension is temporary in nature and completely under the control of the retirees who can avoid or terminate suspension of benefit payments by declining or terminating disqualifying employment.

B. Arbitrary and Capricious Claim

In connection with Plaintiffs' claim that the Trust's interpretation and construction of the 1998 amendments to allow suspension of early retirement benefits was arbitrary and capricious, Plaintiffs rely upon "matters outside the pleadings" and pursuant to Rule 12(c), their motion is being treated as one for summary judgment. Here again the material facts are undisputed. The essence of Plaintiffs' theory is that both the 1996 and 1998 amendments of section 6.7(b) of the Plan use the identical explanatory phrase "(either as a union or non-union construction worker)." According to Plaintiffs, this phrase limits disqualifying employment in the construction industry to jobs as a "construction worker." Since Plaintiffs were employed in the construction industry as construction supervisors and not "construction workers," Plaintiffs assert they were not engaged in "disqualifying employment," and their pension benefits should not have been suspended. In support of this argument, Plaintiffs rely upon a letter from the Fund's counsel Jeffrey M. Wilday, ("Wilday letter") to The Segal Company, the Fund's actuary, approximately one year after the 1998 amendments. That letter states in pertinent part:

> An attorney for one of the recent claimants argued that the language in parentheses limits disqualifying employment in the construction industry to jobs as a 'construction worker.' Under his argument, the relevant question is not whether the participant is working in the construction industry but whether he is working as a 'construction worker', either union or non-union. Since this attorney's client was in a 'supervisory' capacity in the construction industry and not as a 'construction worker', he argued that the participant was not engaged in 'disqualifying employment'. Of course, the trustees' intent was to include <u>any</u> work in the construction industry as 'disqualifying employment' and the claim was denied, but a clarification of the language of the definition may be appropriate.

Plaintiffs argue that the Wilday letter agrees with their interpretation of the 1984 amendment and is an "admission against the Fund's interest and shows that its interpretation and application of the 1998 amendment was unreasonable." On the mistaken premise that the standard of review by this Court is "reasonableness," they claim a right to summary judgment in their favor. The concept of reasonableness is typically associated with the abuse of discretion standard. As explained in *Ross v. Indiana State Teachers Association Ins. Trust*, 159 F.3d 1001, 1008 (7th Cir. 1998):

> When the administrator is given discretion to interpret the terms of the plan, the "extent of the deference given the administrator 'determines the extent of judicial deference.'" *Cozzie*, 140 F.3d at 1107 (quoting *Morton v. Smith*, 91 F.3d 867, 870 (7th Cir. 1996)). This is the case because *Firestone Tire* "did not establish a single standard for reviewing the discretionary decision making of plan fiduciaries" but instead "presented a 'smorgasbord of possibilities' for standards of review." *Morton*, 91 F.3d at 870.
>
> In *Morton*, this court differentiated between the arbitrary and capricious standard of review and the abuse of discretion standard. We stated that when plan administrators are constrained to make 'reasonable' interpretations of a plan, 'their decisions are viewed according to the familiar abuse-of-discretion standard'. *Id.* In

> contrast, we explained, when the administrators need only 'interpret the plan under the broad standard of good faith, their discretion is even more extensive, and judicial review is even more deferential.' *Id.* In that case, the arbitrary and capricious standard applies.

First, the Court agrees with Defendant that Plaintiffs' argument that the Wilday letter constitutes an admission by the Trust that the Fund's interpretation and application of the 1998 amendment is unreasonable, has no basis in fact or law, and is without merit.

The parties seem to agree that unless the Trustee's interpretation and application of the language of the 1998 amendment is unreasonable, the Court must give the highest deference to the Fund's determination. Defendant cites *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1035 (7th Cir. 1990), and Plaintiffs cite *Ross v. Indiana State Teacher's Ass'n. Ins. Trust*, 159 F.3d 1001, 1009 (7th Cir. 1998).

It is long established in our circuit that where the Plan gives its administrators and/or fiduciaries the authority to construe the terms of the Plan, the "appropriate standard of review is whether the 'decision or conduct was arbitrary, capricious or motivated by bad faith' (citation omitted)." *Reilly v. Blue Cross & Blue Shield United of Wis.*, 846 F.2d 416, 419 (7th Cir. 1988). The more recent decision of the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. (1989) leaves no doubt on the issue. There the court held that the "denial of benefits challenged under § 1132(a) (1) (B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary authority to determine eligibility for benefit or to construe the terms of the plan." In the latter situation, "the appropriate standard of review is 'arbitrary and capricious.'" *Id.* at 1035. In flushing out the analysis called for by the "arbitrary and capricious"

standard, our circuit has given us some guides in *Reilly v. Blue Cross*:

> The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of [an ERISA fiduciary]. Nevertheless, the [fiduciary] must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' . . . . In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . . Normally, [a decision by a fiduciary] would be arbitrary and capricious if the [fiduciary] relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before [it] or is so implausible that it could not be ascribed to a difference in view or the product of [its] expertise.

Our circuit court has taught that "the distinction between [the abuse of discretion and arbitrary and capricious standards] is indeed nebulous; [and] in fact we have (both before and since our decision in *Morton*) treated these standards of review as substantially equivalent." *Russ* at 1008. Regardless, this Court finds the arbitrary and capricious standard of review to be most appropriate in the case at bar. There is no dispute that the terms of the Plan gives the Trustees "discretionary authority to determine eligibility or to construe the terms of the Plan." However, such discretion is harnessed by the requirement that the exercise of their powers be in a "uniform nondiscriminatory manner." Section 6.3 of the Plan provides in relevant part:

> The Trustees shall, subject to the requirements of the law, be the sole judges of the standard of proof required

in any case and the application and interpretation of this Plan, and decisions of the Trustees shall final and binding on all parties.

Wherever in the Plan the Trustees are given discretionary powers, *the trustees shall exercise such powers in a uniform nondiscriminatory manner.* (emphasis added).

All questions or controversies of whatsoever character arising in any manner or between any parties or persons in connection with this Plan or its operation, whether as to any claim for benefits, as to the construction of the language of this Plan or any rules and regulations adopted by the Trustees, or as to any writing, decision, instrument or account in connection with the operation of the Plan or otherwise, shall be submitted to the Board of Trustees for decision. In the event a claim or benefits has been denied, no lawsuit or other action against the Fund or its Trustees may be filed until the matter has been submitted for review under the ERISA-mandated review procedure set within Section 6.4. The decision on review shall be binding upon all persons dealing with the Plan or claiming any benefit hereunder, except to the extent that such decision may be determined to be arbitrary or capricious by a court . . . .

It is helpful to compare side by side the 1996 and 1998 amendments.

1996 Amendment	1998 Amendment-
"Disqualifying Employment for the period before age 60 is employment with an employer in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker). [6:7(b) (I)]	For employees who initially retired prior to the participants 53rd birthday: "Disqualifying Employment" with an employer in any capacity in the construction industry (either as a union or non-union construction worker).

Plaintiffs' contention is that the phrase "(either as a union or non-union construction worker)" found in both the 1996 and 1998 amendments to section 6.7(b) of the Plan is critical to a proper interpretation of the 1998 amendment and that both amendments limit disqualifying employment to work as a "construction worker." This, they argue, is how the Trust interpreted the phrase under the 1996 amendment and to interpret it otherwise would be unreasonable. As put by Plaintiffs in their memorandum of law, citing *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 540 (7th Cir. 1996), "supervisors in management" have never been within the scope of a "collective bargaining agreement" (1996 amendment) and to construe them as such would not constitute an interpretation "in an ordinary and popular sense as would [be interpreted by] a person of average intelligence and experience."

The thrust of Plaintiffs' argument is that the decision of the Fund is not consistent with its past decisions in similar cases under the 1996 amendment to the Plan where

"disqualifying employment" was routinely interpreted to exclude supervisory positions in the construction industry. Defendant argues that the Fund's construction of the 1998 amendment to include as "disqualifying employment" a job in "any capacity in the construction industry" encompasses construction supervisors and is a reasonable interpretation.

The parties' focus on the factor of reasonableness is within our circuit's analytical framework in deciding the "arbitrary and capricious" issue, and the Court will accept this *modus operandi*. *See Reilly* at 420. Also see *Egert v. Connecticut General Life Ins. Co.*, 900 F.2d 1032 (7th Cir. 1990).

In deciding this issue of reasonableness, neither the Court nor the Fund, can ignore the Plan document, its *raisón d'etre,* and the insight it provides.

Section 1.6 of the Plan defines "employer" to be an "employer signatory to a collective bargaining agreement with the union requiring contributions to their Fund, an employer (including the union) signatory to any other agreement requiring contributions to this Fund, who in writing adopts and agrees to be bound by the terms of the Trust Agreement and such other persons considered an employer under the Trust Agreement." "Employee" is defined in section 1.8 as "an employee covered by a collective Bargaining Agreement or any written agreement requiring employer contributions on his behalf including such other persons who can be considered an employee under the Trust Agreement." Reading these definitions in context of Article 10 of the Plan dealing with "Non-Bargained Employees," it is clear that workers other than construction workers covered by a collective bargaining agreement are considered employees under the Plan. Section 10.2 defines a "non-bargained employee" as:

> a person who is employed by an employer and who is not covered by a collective Bargaining Agreement, but

> covered by another written agreement requiring Employer contributions on his or her behalf.

This general language is broad enough to cover workers in supervisory positions who may not be covered by a collective bargaining agreement.

Giving effect to all the provisions of the Plan, it is clear that any employee whose employer is making contributions to the Fund is the type of worker in the construction industry this Plan and Fund was meant to benefit. This was as true under the 1996 amendment as it was under the 1998 amendment. As pointed out by Plaintiffs in their brief, "supervisors have never been within the scope of a collective bargaining agreement" with the union; therefore, the defining phrase (either as a union or non-union construction worker) could very well refer to non-bargained employees which could include supervisors. Admittedly, leaving in the phrase "(whether as a union or non union construction worker)" creates some ambiguity and the possibility of differing interpretations. Plaintiffs proffer one interpretation and Defendant another. For reasons expressed, the Court finds that the Fund's interpretation is not unreasonable and its decision suspending Plaintiffs' pension benefits is not arbitrary and capricious. Consequently, Plaintiffs' motion for summary judgment is DENIED. Defendant's motion for judgment on the pleadings is ALLOWED. Defendant's pending motion for summary judgment is mooted by this Order. Case terminated.

Entered this 9th day of August, 2000.

/s/ Joe Billy McDade
Chief United States District Judge

Supreme Court, U.S.
FILED
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No. 02-891

In the Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,

Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Under the "anti-cutback" rule contained in section 204(g)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054(g)(1), "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," unless that amendment is authorized under two sections of ERISA not relevant here. ERISA section 204(g)(2)(A), added by the Retirement Equity Act of 1984, clarifies that "[f]or purposes of" this anti-cutback rule, "a plan amendment which has the effect of * * * eliminating or reducing an early retirement benefit or a retirement-type subsidy * * * with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits," and thus is also prohibited.

The question presented is whether, when an ERISA pension plan is amended to expand the categories of "disqualifying" post-retirement employment that "suspend" early retirement benefits under the plan, it violates ERISA's anti-cutback rule to apply that amendment to plan participants who had already retired, were already receiving benefits, and were already working in forms of post-retirement employment that were non-disqualifying under the prior version of the plan but were disqualifying under the amendment.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The anti-cutback rule of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, section 204(g),[1] prevents a pension fund from promulgating an amendment that "has the effect of * * * eliminating or reducing an early retirement benefit," if that benefit is "attributable to service before the amendment." In this litigation, the Seventh Circuit held that an amendment that changed the conditions under which a pension fund can "suspend" already-accrued benefits violates this anti-cutback rule.

The Seventh Circuit's decision is entirely faithful to the statute's language, and is plainly correct. Although – as petitioner stresses at length – it is true that in *Spacek* v. *Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), the Fifth Circuit held that "suspending" pension benefits is not a form of "reducing" or "eliminating" those benefits, and thus does not violate the anti-cutback rule, the *Spacek* decision is in considerable tension with earlier Fifth Circuit precedent and therefore may not be binding even in that Circuit. Petitioner's broad assertions about the importance of this litigation to pension fund administration likewise have no merit. Thus, there is no reason for this Court to grant review.

STATEMENT

1. ERISA "is a 'comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system.'" *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 122 S. Ct. 708, 712 (2002)

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[1] Following convention, throughout this brief we cite by ERISA section number rather than to ERISA's codification in the U.S. Code. The two sections that we mainly discuss – ERISA sections 203 and 204 – are codified at 29 U.S.C. §§ 1053, 1054.

(quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980))). It is a commonplace that ERISA does not require an employer to provide its employees with any specific benefits. See, *e.g.*, Pet. App. 5a-6a. ERISA does, however, extensively regulate benefits once those benefits *are* provided. Thus, "ERISA protects employee pensions and other benefits by providing insurance (for vested pension rights), specifying certain plan characteristics in detail (such as when and how pensions vest), and by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans." *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996) (citations omitted); see also Pet. App. 6a.

For example, among ERISA section 203's various requirements for retirement plans are limits on a pension fund's discretion in how it may condition the receipt of retirement benefits based on whether a participant has resumed employment after initially retiring (and beginning to collect retirement benefits). Where a participant is covered by and receiving benefits under an ERISA pension fund sponsored by a single employer, the plan may suspend retirement benefits only if the employee resumes working for the "employer who maintains the plan under which [the retirement] benefits were being paid" (ERISA § 203(a)(3)(B)(i)) – in other words, resumes working for the original employer – and only for the period during which the participant is so reemployed. *Ibid.* In the case of participants in a "multiemployer plan,"[2] retirement benefits may be suspended only if the participant resumes work in a job "in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced," and again only during the period in which the participant is engaged in this disqualifying employment. ERISA § 203(a)(3)(B)(ii).[3]

[2] ERISA section 3(37) defines a multiemployer plan as a plan "maintained pursuant to one or more collective bargaining agreements" between a union or unions and employers, "to which more than one employer is required to contribute." Multiemployer plans "are common in industries with many small companies, each too small to justify an individual plan. They are also found in industries where, because of seasonal or irregular employment and high labor mobility, few workers would qualify under an individual company's plan (if one were established)." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 62-63 (3d ed. 2000) (quoting EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-59 (3d ed. 1987)).

2. As this Court has repeatedly explained, "when Congress enacted ERISA it 'wanted to ... make sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.'" *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996) (quoting *Nachman*, 446 U.S. at 375). Thus, ERISA provides, for example, a host of funding and vesting rules to protect participants' promised benefits. See page 2, *supra*; Pet. App. 6a. But the most direct protection of workers' reasonable

[3] Although a plan is required to abide by section 203's suspension rules in the case of "normal" retirement benefits – that is, retirement benefits available to an employee who has reached the normal retirement age, either as defined in the plan or under ERISA's default "normal" retirement age of 65 (see ERISA § 3(24)) – these rules do not apply to "early" retirement benefits. Thus, the Department of Labor's regulations implementing section 203 specify that "[a] plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age * * * for any reemployment and without regard to the provisions of section 203(a)(3)(B) and this regulation to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." 29 C.F.R. § 2530.203-3(a).

reliance interests is the "anti-cutback" rule contained in ERISA section 204(g).

As originally enacted, section 204(g) provided that, with narrow exceptions, "[t]he accrued benefit of a participant under a plan *may not be decreased by an amendment of the plan*." Pub. L. No. 93-406, Tit. I, § 204(g), 88 Stat. 858 (emphasis added).[4] Because of the way accrued benefits were defined under ERISA, this provision "did not prevent the reduction of a plan's alternative schedule of benefits for workers who retired early." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 164 (3d ed. 2000). Congress legislatively cured this omission in 1984, by amending ERISA section 204(g). The existing general rule was renumbered as section 204(g)(1), and a new subsection 204(g)(2) was added, which provided that:

> For purposes of paragraph (1), *a plan amendment which has the effect of* –
>
> (A) *eliminating or reducing an early retirement benefit* or a retirement-type subsidy (as defined in regulations)
>
> * * *
>
> with respect to benefits attributable to service before the amendment *shall be treated as reducing accrued benefits*. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Retirement Equity Act of 1984 ("REA") § 301(a)(2), Pub. L. No. 98-397, 98 Stat. 1451 (emphasis added).

3. The Central Laborers' Pension Fund ("the Fund") is a multiemployer pension fund whose participants are mainly construction workers in central Illinois. The Fund is a "qualified" pension plan governed by ERISA. Participants are entitled to a variety of retirement benefits under the Fund; in particular, the Fund offers a traditional retirement pension (available to participants aged 65 or older), as well as two distinct forms of early-retirement benefits. All three are "defined benefit" plans.[5]

Eligibility for the first of the two types of early-retirement benefits is tied to a combination of the participant's age and the time period during which he or she contributed to the Fund. For example, since October 1, 1993, a participant has been eligible to retire at age 53 if at that age he has earned five "pension credits" under the Plan (see Plan § 3.5(a)[6]), which are accrued based on the number of years

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[4] Reductions in benefits were allowed "with the consent of the Secretary of Labor, in the event of a substantial business hardship, (sec. 412(c)(8) of the [Internal Revenue] Code [and the parallel section 302 of ERISA]) or [under] the rules permitting a reduction of benefits in the case of certain multiemployer plans (sec. 4281 of ERISA)." S. REP. NO. 98-575, at 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576.

[5] A "defined benefit" retirement plan "is one where the employee, upon retirement, is entitled to a fixed periodic payment." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999) (citation and internal quotation marks omitted). "[T]he employer typically bears the entire investment risk" in a defined benefit plan. *Ibid.* Defined benefit plans contrast with "defined contribution plans," which are "one[s] where employees and employers may contribute to the plan, and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Ibid.* (citation and internal quotation marks omitted).

[6] The Fund filed the "Restated Plan Rules and Regulations," as restated effective October 1, 1994 (herein referred to as the "Plan") – along with amendments thereto – in the district court as Appendix I to its February 7, 2000, Motion for Summary Judgment.

that the participant has worked for employers who participate in the Fund and the number of hours the participant worked for these employers in each of those years.[7]

The other form of early-retirement benefit, which the Fund calls a "Service-Only Pension," depends only on the number of years of "vesting service" or the number of "pension credits" that the participant has accrued. Participants may retire and receive their "service-only" pension once they have accumulated 30 "pension credits," regardless of their age at the time of retirement. The pension a participant receives each month under the "service-only" program is the same amount as he would receive each month under the normal retirement plan. See Pet. App. 4a. Thus, because statistically an early retiree is expected to receive his pension for a longer period than someone retiring at the "normal" age, the "service-only" pension is a "retirement-type subsidy" as that term is used in ERISA. See *Bellas* v. *CBS, Inc.*, 221 F.3d 517, 525 (3d Cir. 2000).

4. Thomas E. Heinz and Richard J. Schmitt, Jr., are each participants in the Fund. Pet. App. 4a. As of 1996, each had accrued at least 30 "pension credits," and thus had met all of the conditions to retire and to receive his "service-only" pension. Both did so. *Ibid.* Under the terms of the Fund when Messrs. Heinz and Schmitt retired, the service-only pension was to be suspended if a participant worked in specified "disqualifying employment." Although working as a union

[7] The formula for determining the number of pension credits a participant obtains in any given year has changed over time, and the details are irrelevant. But as an example, a participant could receive up to 2 pension credits during 1995, depending on the number of creditable hours that he worked during that calendar year. Participants working more than 2000 creditable hours received 2.0 pension credits; those working between 1900 and 1999 creditable hours received 1.9 pension credits, and so on. See Plan § 4.1(a)(1).

or non-union construction worker was disqualifying under the plan as it then existed (see *ibid.*), it is uncontroverted that working as a *supervisor* in the construction industry was *not* "disqualifying employment." See Pet. 4; Pet. App. 5a. After retiring as construction workers, both respondents began working as supervisors in the construction industry, while – as the plan allowed – collecting their early-retirement pensions.

Two years after respondents retired, the Fund amended the terms of the plan to expand the definition of disqualifying employment for purposes of early-retirement benefits. Under this 1998 amendment, the Fund would suspend early retirement benefits for work "in any capacity in the construction industry (either as a union or non-union construction worker)." See Pet. App. 5a. Although this amendment focused on "construction worker[s]," the Fund interpreted the amendment to prohibit employment even in a supervisory capacity in the construction industry. The plan also construed the amendment to apply to participants who had already qualified for early-retirement benefits prior to the amendment. Because Messrs. Heinz and Schmitt continued to work as supervisors in the construction industry, the Fund suspended their early retirement pension benefits.

5. After exhausting intra-Fund avenues for review of the decision to suspend their benefits, Messrs. Heinz & Schmitt brought suit in the Central District of Illinois. They claimed that the retroactive application of the 1998 Amendment to suspend their benefits violated the plain terms of the anti-cutback rule in ERISA section 204(g), which precludes amendments that "ha[ve] the effect of eliminating or reducing an early retirement benefit." In the alternative, they argued that the Fund acted arbitrarily and capriciously in interpreting the 1998 amendment to render their employment disqualifying, because the amendment by its terms is limited to employment as a (union or non-union) "*construction*

worker," rather than as a *supervisor* in the construction industry.

6. On cross-motions for judgment on the pleadings, the district court ruled in the Fund's favor. See Pet. App. 33a-45a. The Seventh Circuit reversed. See Pet. App. 3a-31a. According to the court of appeals,

> plaintiffs' loss of the option of working as construction supervisors was a reduction of their early retirement benefits within the meaning of [section 204(g)(2)]. A participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit "reduces" the benefit just as surely as a decrease in the size of the monthly benefit payment.

Pet. App. 9a. The court rejected the Fund's attempt to distinguish between suspensions of benefits and other reductions. As the court explained,

> [a]lthough with a suspension the interruption in benefit payments is temporary, the retiree never recovers the payments lost during the employment period. The amendment thus "eliminates" monthly benefit payments for participants who take certain jobs after retirement and "reduces" the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues. Plaintiffs lost a valuable right they had earned before the amendment – the right to continue to work in the industry while receiving monthly benefit payments – and that loss was permanent.

Pet. App. 10a.

The court considered the Fifth Circuit's decision in *Spacek* v. *Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), on which the district court had relied, but found it unconvincing. Pet. App. 11a-22a. In particular, the court disputed the notion that its decision would render the word "suspension" redundant elsewhere in ERISA (Pet. App. 12a-15a), explained that an offhand comment by Representative Clay in the final House debates over REA was ambiguous at best and in any event due little weight (Pet. App. 16a-17a), and found a Treasury Regulation relied on by *Spacek* to be irrelevant to the interpretation of the appropriate scope of the anti-cutback rule (Pet. App. 18a-20a). Having ruled for respondents on statutory grounds, the court did not reach respondents' alternative, arbitrary-and-capricious, argument. See Pet. App. 23a. Judge Cudahy dissented. See Pet. App. 24a-31a.

REASONS FOR DENYING THE PETITION

This litigation does not warrant the Court's review. Although petitioner stresses that the decision below conflicts with the Fifth Circuit's decision in *Spacek*, that is insufficient to justify certiorari. It is doubtful whether *Spacek* would in fact be binding even in the Fifth Circuit, and in any event only two courts of appeals have analyzed the question presented. Moreover, petitioner's attempt to portray this litigation as being of great importance to pension plans is completely overblown. Finally, the Seventh Circuit's decision is entirely consistent with both the language and the purpose of the anti-cutback rule, and is plainly correct.

I. THERE IS NO NEED FOR THIS COURT TO RESOLVE THE PURPORTED CIRCUIT SPLIT AT THIS TIME.

Petitioner stresses that ERISA should be interpreted consistently nationwide, and asserts that "the conflict between the Fifth and Seventh Circuits with regard to the anti-cutback rule will result in exactly the kind of balkanization of pension rules which ERISA was designed to prevent" (Pet. 7). However, there may very well not be a circuit split for this Court

to resolve. Although the *Spacek* court held that an amendment that led to the "suspension" of early retirement benefits was not barred by the anti-cutback rule (see 134 F.3d at 288-291), the court seems to have based that decision in some part on a fundamental misunderstanding of the status of early-retirement benefits under the anti-cutback rule. In the process, the court failed to follow earlier Fifth Circuit precedent on the status of early-retirement benefits. But in the Fifth Circuit, "[w]here two panel decisions conflict, *the prior decision constitutes the binding precedent*." *United States* v. *Texas Tech. Univ.*, 171 F.3d 279, 286 n.9 (5th Cir. 1999) (emphasis added); see also *Lucky-Goldstar, Int'l (America), Inc.* v. *Phibro Energy Int'l, Ltd.*, 958 F.2d 58, 60 (5th Cir. 1992) ("[u]nder the law of [the Fifth] circuit," where two panel decisions conflict "the earlier panel opinion controls") (citing *Alcorn Cty.* v. *U.S. Interstate Supplies*, 731 F.2d 1160, 1166 (5th Cir. 1984)). No petition for rehearing was filed in *Spacek*, and neither the Fifth Circuit itself nor any district court within the Fifth Circuit has relied on the relevant portion of that case. Thus, it is unclear whether *Spacek* in fact describes the law even in the Fifth Circuit.

As petitioners have repeatedly admitted[8] – and as the Seventh Circuit held in this case (Pet. App. 18a-19a) – early retirement benefits are treated as accrued benefits for purposes of section 204(g). In 1993, the Fifth Circuit also expressly held that early retirement benefits are "accrued benefits" under the anti-cutback rule. See *Harms* v. *Cavenham Forest Indus., Inc.*, 984 F.2d 686, 691-692 (5th Cir. 1993). Despite *Harms*, the *Spacek* court refused to acknowledge that early retirement benefits are accrued benefits for purposes of section 204(g). See 134 F.3d at 291 ("early retirement benefits * * * *may or may not be* fully accrued") (emphasis added). But if early-retirement benefits are treated as accrued benefits for purposes of the anti-cutback rule – as the *Harms* court held and as the Seventh Circuit held in this case – then suspending those benefits "reduces" the total amount of accrued benefits, and thus violates the anti-cutback rule. See Robert B. Lamb, *Early Retirement Benefits and the Arbitrary and Capricious Standard Under ERISA in* Spacek *v.* Maritime Ass'n, 32 CREIGHTON L. REV. 1721, 1748-1749 (1999) ("*Harms* would support Spacek's argument that [section 204(g)] shields him from subsequent amendments."); see also Pet. App. 18a-19a.

[8] See, *e.g.*, Seventh Circuit Brief and Argument of Defendant-Appellee Central Laborers' Pension Fund, at 8 (Nov. 30, 2000) ("The Fund, as it did before the District Court, agrees that early retirement benefits have accrued status."); Answer ¶ 16 ("admit[ting] the factual allegations of Paragraph 16 of Plaintiffs' Complaint," which alleged that "[t]he monthly retirement benefits received by Plaintiffs prior to the 1998 Amendment are accrued benefits").

Because it is the earlier case, future panels in the Fifth Circuit are obligated to follow *Harms* rather than *Spacek*. But since *Harms* suggests that *Spacek* was wrong as a matter of circuit precedent, the conflict petitioner identifies may not exist. Not even district courts in the Fifth Circuit are bound by *Spacek* to the extent *Spacek* conflicts with earlier circuit precedent. Given the serious possibility that future courts in the Fifth Circuit may not consider *Spacek* to be binding, this Court's attention to the supposed split of authority is not necessary. The question whether amendments that expand the scope of the suspension of early retirement benefits violate the anti-cutback rule can always be addressed in the future, after it becomes evident that the courts of appeals are in fact divided on the issue.

In any event, the case law petitioners cite to stress the need to prevent the "balkanization" of ERISA law – *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987), and *Egelhoff* v. *Egelhoff*, 532 U.S. 141 (2001) – involves the disruption that might arise were *states* allowed to pass their own employee benefit laws that were inconsistent with ERISA.

As the Court explained in *Fort Halifax*, ERISA's preemption provision was designed to "'eliminat[e] the threat of conflicting and inconsistent *State and local regulation*.'" *Fort Halifax*, 482 U.S. at 9 (quoting 120 Cong. Rec. 29,197 (1974) (statement of Rep. Dent)) (emphasis added).

Unlike instances where states have passed laws addressing subjects governed by ERISA – where, unless the courts intervene, plans will be, and will *remain*, subject to inconsistent rules – the difference in interpretation of the anti-cutback rule between the Fifth and Seventh Circuits, even if it exists, is of much less moment. In particular, only two courts of appeals have analyzed the question presented here. Allowing other courts to consider the issue, in a variety of distinct factual situations, might lead the lower courts to resolve the purported circuit split. And if not, the additional attention of these courts to the question would assist this Court were it eventually to consider the issue. See ROBERT L. STERN *ET AL.*, SUPREME COURT PRACTICE 229-230 (8th ed. 2002). ERISA covers an immense variety of pension plans; this Court would be well advised to wait until lower courts have confronted the applicability of the anti-cutback rule to plan amendments that purport to "suspend" benefits in a wider variety of factual scenarios before addressing the issue.

Finally, Congress recently amended section 204(g) to authorize amendments that reduce benefits – but *only* if those amendments met specific conditions. In particular, Congress ordered the Secretary of the Treasury to issue regulations allowing plans to promulgate amendments that "reduce[] or eliminate[] benefits or subsidies which create significant burdens or complexities for the plan and plan participants, *unless such amendment adversely affects the rights of any participant in a more than de minimis manner*." Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 645(b)(2), 115 Stat. 125-126 (2001) (emphasis added). Neither the Fifth nor the Seventh Circuit has analyzed this amendment, and in particular the Fifth Circuit has not had the

opportunity to determine whether it undermines that court's previous interpretation of the anti-cutback rule. Granting certiorari before the Fifth Circuit has the opportunity to consider whether this statutory amendment alters its analysis would be premature.

II. PETITIONER VASTLY OVERSTATES THE IMPORTANCE OF THIS CASE TO PENSION PLANS.

Petitioner errs in portraying (at Pet. 8-11) this litigation as being one with far-reaching consequences to pension funds nationwide. Much of petitioner's argument for the importance of this case relies on hypothetical instances where "the financial integrity" of a plan might be at risk were a plan's administrators not able to amend the plan. See Pet. 8, 10. The problem with this argument is that there already exists a "substantial business hardship" exception to the anti-cutback rule, which authorizes pension funds – with the permission of the Secretary of Labor – to amend a plan to reduce accrued benefits to protect a fund's financial integrity. See ERISA § 302(c)(8).[9] This escape hatch exists specifically for those instances where a pension fund might not otherwise be able to fulfill its obligations. But except for such extreme instances, the very choice to create a defined-benefit plan rather than a defined-contribution plan entails the *conscious decision* that the plan (and the employers who fund it) may be subjected to additional financial burdens if some prediction – for example, expected rates of return of the fund's investments in the market or, as in this case, the number of employees who will choose to accept early retirement – turns out to be wrong. See *Hughes Aircraft*, 525 U.S. at 439. That

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[9] In this case petitioner did not seek to amend its plan under the "substantial business hardship" rules. See Pet. App. 7a.

such predictions at times turn out to be incorrect is a necessary fact of life, rather than a cause for concern.[10]

Petitioner also claims that the supposedly "irreconcilable rulings of *Spacek* and *Heinz*" will wreak havoc on the administration of large plans, with "[t]he administrator of such a fund fac[ing] the daunting task of properly applying" the rules of each of these cases. Pet. 9. According to petitioner, "litigation would seem to be inevitable regardless of how the administrator attempts to apply these conflicting decisions to [a nationwide] plan." *Ibid.* But there is nothing irreconcilable about administering a plan subject to both of these decisions; *Spacek* in no way *requires* a plan to "suspend" accrued benefits. Thus, those few pension funds that might be directly subjected to litigation in both the Fifth and Seventh Circuits should not rely on *Spacek* – assuming, as we discussed above (at page 10-11), that *Spacek* is even controlling in the Fifth Circuit. Although these plans might *prefer* petitioner's rule, it belies reason to imply that *not* promulgating an amendment that would be authorized under *Spacek* but not acceptable in the Seventh Circuit would somehow require inconsistent plan administration, or subject such a plan to litigation.

Finally, petitioner (at Pet. 10-11) seeks to portray this litigation as important by focusing on the Seventh Circuit's explanation that "an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit

[10] In any event, an amendment expanding limitations on post-retirement reemployment is unlikely to protect the financial well being of a pension plan, because under such an amendment participants are still entitled to retire and collect their pensions. Even under the amended version of the plan at issue in this litigation, Messrs. Heinz and Schmitt are entitled to receive their pensions – "jeopardiz[ing]" "the financial integrity" of the Fund (Pet. 8) – merely by choosing to stop working altogether, or even simply by going to work in an unrelated industry.

just as surely as a decrease in the size of the monthly benefit payment." Pet. App. 9a. According to petitioner, "[t]he potential disparate interpretation of 'materiality' among circuits fundamentally threatens the integral uniformity of ERISA." Pet. 10-11. But the key word in that sentence is "*potential*." There are no disparate interpretations of what constitutes a "materially greater restriction" for this Court to review. Rather, petitioner has focused on a portion of the Seventh Circuit's *explanation* for why amendments that expand the criteria for suspending benefits violate the anti-cutback rule. Until and unless that explanation has itself been shown to cause any problem in the administration of ERISA, this Court should instead focus on what the Seventh Circuit in fact decided: amendments that expand when pension benefits may be "suspended" violate the anti-cutback rule. That decision is not the broad "'anti-amendment' rule" (Pet. 10) about which petitioner complains.[11]

III. THE DECISION BELOW IS PLAINLY CORRECT

Review in this case is also unnecessary because the Seventh Circuit's decision is based on the only plausibly defensible interpretation of the anti-cutback rule. If there were any doubt about the correctness of the decision below, a simple hypothetical should eliminate it entirely: Under petitioner's approach, a plan would be entitled to promulgate an amendment "suspending" *all* early retirement benefits for 18 months, *without violating the anti-cutback rule*. Nothing in

[11] The recent amendment to section 204(g) discussed above (at page 12, *supra*), also helps demonstrate that the Seventh Circuit's decision will not wreak havoc on ERISA plans. Rather, the Seventh Circuit's supposed "materiality" standard (Pet. 10), which petitioner portrays as an "'anti-amendment' rule" (*ibid.*), is quite similar to Congress's authorization for plan amendments only to the extent that they cause no more than a "de minimis" reduction in a participant's benefits. See Pub. L. No. 107-16, § 645(b)(2), 115 Stat. 125-126 (2001).

petitioner's analysis depends on a "suspension" being related to post-retirement employment or, for that matter, there existing any conditions whatsoever limiting whose benefits are suspended. Rather, according to petitioner, so long as the dollar amount of the (theoretically available) monthly benefit check is not "reduced," and as long as a plan does not "eliminate" early-retirement benefits *entirely*, then plans may be amended willy-nilly to "suspend" benefits.

As this example demonstrates – and as the Seventh Circuit concluded – there is nothing magical about the term "suspension" of benefits. The "suspension" of benefits is merely one manner by which an amendment might reduce or eliminate those benefits – and thus be barred by the anti-cutback rule. Any form of reduction of early-retirement benefits – whether called the suspension of benefits (as it was here), or the "offset" of benefits (as in *Michael* v. *Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1027-1028 (9th Cir. 2001)), or the removal of a "cost of living adjustment" (as in *Hickey* v. *Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992)) – violates the anti-cutback rule. See Pet. App. 9a.

Not only is there no textual support for excluding "suspensions" of benefits from the scope of the anti-cutback rule, but doing so would go against the very reason that rule exists, which is to protect "justified expectations and entitlements" under a plan. *Michael*, 266 F.3d at 1027. Here, a plan member similar to respondents could have decided in 1997 that he was able to retire, based on a calculation that he would be entitled to $1500 a month in benefits and could earn $1000 in non-disqualifying post-retirement employment. According to petitioner, the anti-cutback rule does not prevent a plan from changing the rules in the year 2000, such that this plan member would suddenly have to live on $1500

a month rather than $2500.[12] That is absurd, and finds no support in the anti-cutback rule.

In this case, Messrs. Heinz and Schmitz's retirement benefits were significantly reduced; when they retired, they understood their retirement benefits to be a specified amount each month so long as they did not engage in certain forms of post-retirement employment. Thus, each could make financial calculations about whether to retire based on the amount of retirement benefits he would receive and the amount he expected to be able to earn in non-disqualifying post-retirement alternative employment. By promulgating an amendment that forced respondents to choose *either* their monthly pension check *or* whatever money they could earn in what had been non-disqualifying alternative employment, the Fund has greatly reduced respondents' pension benefits.

Nothing in the Petition undermines this straightforward analysis. The Fund stresses (at Pet. 12) that the term "reduction" is used in conjunction with the term "suspension" elsewhere in ERISA, and argues that reductions therefore cannot include suspensions. But the Fund does not even attempt to refute the Seventh Circuit's explanation (at Pet. App. 12a-14a) that elsewhere in ERISA the comparison is in fact between "*amendments that reduce benefits*, on the one hand, and *suspension of benefit payments*, on the other." Pet. App. 13a (emphasis supplied). It is clear that the mere suspension of benefit payments, *if authorized*, does not violate the anti-cutback rule. Thus, under section 203, a pension plan could be drafted that provides for the suspension of early retirement benefits if a participant accepts *any* form of post-retirement employment. See pages 2-3 and note 3, *supra*. And, were Messrs. Heinz and Schmitt to accept employment as con-

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[12] In this example, a rational retiree would stop working (and lose that $1000 in income) rather than give up his $1500 in pension benefits.

struction workers, under the terms of their plan – *as it existed when they qualified for early retirement* – their benefits could similarly be suspended without violating the anti-cutback rule. But section 203 does not trump section 204; an amendment that *expands* the forms of post-retirement employment that authorize the plan to suspend benefits reduces those benefits, and violates the anti-cutback rule.

Representative Clay's floor comments (see Pet. 13-14) also do not support excluding amendments that expand the availability of suspensions from the anti-cutback rule. Rather – pace petitioner – those comments in fact have no bearing on the question. Representative Clay merely stressed – entirely correctly – that REA did not alter section 203's distinction between what forms of suspensions may be promulgated for "normal" retirement benefits as compared to early-retirement benefits. Compare note 3, *supra*. Neither of these forms of benefit suspension *themselves* violate the anti-cutback rule – but that doesn't mean that an *amendment* expanding the forms of post-retirement employment that result in benefits suspension would not violate the anti-cutback rule. See Pet. App. 16a n.11; 20a.

Finally, the regulations cited by the Fund (at Pet. 14) also have no bearing on the question presented by this case. The first of these, 29 C.F.R. § 2530.203-3(a), merely reiterates that a pension plan is authorized to suspend benefits when a participant accepts specified post-retirement employment without violating ERISA. But *that* is uncontroverted (see Pet. App. 20a-21a; note 3, *supra*), and is a separate question from whether a plan may *change* the rules for suspending benefit payments without violating the anti-cutback rule. Similarly (as the Seventh Circuit explained in detail, see Pet. App. 18a-20a), the second of these regulations, 26 C.F.R. § 1.411(c)-1(f)(1) – which predates REA's clarification that reductions of early retirement benefits shall "'be *treated* as reducing accrued benefits'" (Pet. App. 18a (quoting ERISA § 204(g)(2) (emphasis supplied)) – clarifies only that *already*

authorized suspensions do not violate the anti-cutback rule. An interpretation of this regulation that allowed a plan to *change* the rules on suspensions is not only textually unwarranted but would also violate REA (see Pet. App. 18a-19a), and therefore should be rejected.

* * * * *

The Seventh Circuit's interpretation of the anti-cutback rule is the only one that makes any plausible sense. Given the obvious correctness of the decision below, the uncertainty about whether there is a circuit split on the question presented, and the minimal importance the ruling in this case will have to pension plans generally – because plan administrators can always amend a plan under the "substantial business hardship" rules if there is any serious risk to the financial integrity of a plan – this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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CENTRAL LABORERS' PENSION FUND,
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v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In their brief, Respondents argue that (i) there may be no conflict between the Fifth and Seventh Circuits; (ii) the importance of the instant case to pension plans across the country is overstated; and (iii) the decision below is plainly correct. These arguments are wholly unpersuasive. Further review by this Court is warranted to resolve an inter-circuit conflict of national significance.

1. *There Is An Undeniable Conflict Between the Circuits.*

Respondents' initial argument in opposition to the petition for writ of certiorari is that there may well be no conflict of the circuits. This contention ignores and is utterly at odds with the majority panel below which expressly rejected the Fifth Circuit's decision in *Spacek v. Maritime Ass'n., ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998). Since the opin-

ion was in direct conflict with the Fifth Circuit, it was circulated pursuant to Circuit Rule 40(e) to all members of the Seventh Circuit in regular service. (App. 4a). Judge Cudahy, in dissent, also recognized that the majority's holding was contrary to the Fifth Circuit's *Spacek* decision. (App. 24a).

Despite the Seventh Circuit's acknowledgment of the conflict that its decision created, Respondents aver that a conflict, in fact, may not exist at all. They base this contention on *Harms v. Cavenham Forest Indus., Inc.*, 984 F.2d 686 (5th Cir. 1993), a Fifth Circuit decision antedating the *Spacek* ruling which, Respondents contend, represents a conflict within the Fifth Circuit. Relying on other Fifth Circuit case law which provides that in instances of an intra-circuit conflict, the earlier decision controls, Respondents argue that *Harms*, not *Spacek*, is the law in the Fifth Circuit. Analysis of *Harms*, however, quickly reveals the flaw in Respondents' contention.

The issue the Fifth Circuit considered in *Spacek*, as in the instant case, was whether a suspension of benefits resulting from an amendment to a plan's disqualifying employment provision violated ERISA's anti-cutback rule. By contrast, the Fifth Circuit in *Harms* considered whether a certain early retirement benefit was an accrued benefit for purposes of ERISA § 204(g)(2). The court in *Harms* in no way considered whether a suspension of benefits was an "elimination" or "reduction" for purposes of Section 204(g)(2).

Respondents nonetheless aver that the court in *Spacek* ". . . seems to have based that decision on a fundamental misunderstanding of the status of early retirement benefits under the anti-cutback rule. In the process, the court failed to follow earlier Fifth Circuit precedent on the status of early retirement benefits." (Opp. 10). Additionally, Respondents state that the *Spacek* court refused to acknowledge that early

retirement benefits are accrued benefits for purposes of ERISA § 204(g). (Opp. 11).

Respondents, however, mischaracterize the action of the unanimous panel in *Spacek*. As the court explained, it was not called upon in the case to reach the issue of whether early retirement benefits are accrued benefits under ERISA's definition of that term. While acknowledging that the *Harms* court had apparently concluded that early retirement benefits or retirement-type subsidies are accrued benefits under ERISA, the *Spacek* court simply declined to address the question since the issue was not before it. *Spacek*, 134 F.3d 283, 291 n.9. In *Spacek*, the court found the issue of whether early retirement benefits were "accrued" for purposes of ERISA § 204(g)(2) to be irrelevant to the resolution of the matter before it. In finding that it need not reach this issue, the court reasoned that an amendment providing for the suspension of early retirement benefits, whether fully accrued or not, did not violate § 204(g)(2) because a "suspension" is neither an "elimination" or "reduction" of benefits. The *Spacek* court correctly did not consider its opinion to be in conflict with *Harms*, and Respondents have failed to demonstrate that a conflict exists.

The Fifth and Seventh Circuits, faced with cases of striking factual similarity, have considered whether a "suspension" of early retirement benefits is a "reduction" or "elimination" of benefits prohibited under ERISA's anti-cutback rule and rendered opinions which are diametrically opposed to each other. "Cases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." R.Stern, et al., Supreme Court Practice 434 (8th Ed. 2001). In instances when a different legal standard requiring a different ruling is established in a "very similar case coming from another lower court, there is a clear conflict." W. Rehnquist, The Supreme

Court, 265 (1987). As recognized by the Seventh Circuit, its holding in the instant case and the *Spacek* decision present just such a conflict that only this Court can resolve.

2. *If the Circuit Conflict Is Not Resolved, the Adverse Impact on Multiemployer Pension Plans Will Be Substantial and Immediate.*

In its effort to discourage this Court from granting the petition for writ of certiorari, Respondents downplay Petitioner's forecast of significant, adverse consequences for multiemployer pension plans if the decision below is left to stand. As to Petitioner's contention that the amendment of a plan's "disqualifying employment" rules is necessary from time to time to protect its fiscal integrity, Respondents cite to the "substantial business hardship" exception to the anti-cutback rule. See ERISA § 302(c)(8). As to less extreme financial exigencies, Respondents argue, somewhat cavalierly, that unexpected financial downturns (or, as in the instant case, larger than anticipated numbers of early retirees) are simply a "necessary fact of life." (Opp. 14).

The *amicus curiae* briefs filed in support of the Petitioner, however, persuasively demonstrate that the negative effects of an unresolved circuit conflict on plans and participants alike are quite real and should not be underestimated. Central States, Southeast and Southwest Areas Pension Fund ("Central States") advises that it is the largest multiemployer defined pension plan in the United States with more than 187,000 active participants, over 75,000 vested inactive participants, and over 199,000 retirees. The National Coordinating Committee for Multiemployer Plans (the "NCCMP") is a non-profit, tax-exempt organization currently having 309 multiemployer pension plan affiliates throughout the country. Each *amicus curiae* confirms Petitioner's contentions and demonstrate the error of Respondents' assertions that the impact of the decision below is overstated.

According to Central States' brief, its plan has already been affected. On March 13, 2002, Central States amended its pension plan effective July 1, 2002, to expand its definition of disqualifying employment for participants retiring after the amendment's effective date, thereby increasing the likelihood of benefit suspension of retirees. The amendment was enacted in reliance, in part, on *Spacek*. After learning of the decision below, however, Central States was faced with a serious administrative dilemma since its participants are potentially subject to the two conflicting rules set forth by the Fifth and Seventh Circuits.[1] (Brief of Central States as *Amicus Curiae* 3). Recognizing the uncertainty of the current legal landscape, Central States subsequently rescinded its amendment to the prohibited re-employment rules which it believed to be in the best interest of the financial integrity of the plan and of its participants.

The NCCMP brings an even broader perspective to the importance of the issue presented in the instant case and the administrative problems created by an unresolved circuit conflict. According to the NCCMP, multiemployer plans previously have amended disqualifying employment provisions in reliance on statute, case law and IRS guidance without concern that they could be violating ERISA's anti-cutback provision. The Seventh Circuit's decision has imposed a new and unwarranted restraint on the ability of trustees to respond to changing economic circumstances. As a result, NCCMP expects that the trustees of plans which have amended their disqualifying employment rules must review and revise their current suspension rules. (Brief of NCCMP as *Amicus Curiae* 8).

Additionally, the NCCMP agrees with Central States' assessment of the administrative burden which will be placed

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[1] The practical administrative problems faced by Central States are well-described in its brief and need not be recounted here.

on pension plans which have participants working or residing in the states comprising the Seventh Circuit. (Brief of NCCMP as *Amicus Curiae* 12). The NCCMP correctly points out that the administrative burden on trustees outside the Fifth, Sixth or Seventh Circuits is even more difficult. (Brief of NCCMP as *Amicus Curiae* 13). And, perhaps most significantly, the NCCMP concludes that in removing the long-established ability of trustees to protect the actuarial soundness of plans through adjustment of disqualifying employment rules, the Seventh Circuit has placed the interests of employees who "retire" at early ages and continue to work such as Respondents[2] over the interests of active employees, unemployed participants and actual retirees. (Brief of NCCMP as *Amicus Curiae* 14-15).

Each *amicus curiae* brief completely discredits Respondents' assertions that the instant case lacks the importance attributed to it by Petitioner. Each brief also persuasively refutes Respondents' suggestion that the issue presented is one that should be resolved over time by other lower courts. The administrative and economic burdens faced by multi-employer plan trustees and administrators in the wake of the Seventh Circuit's decision are daunting and will have significant and immediate adverse impact. The case presents an excellent vehicle for a prompt resolution of an important ERISA issue by this Court.

3. *The Need for a Definitive Adjudication Is Manifest in That Both the Fifth Circuit and the Seventh Circuit Claim That Their Respective Decision Is "Plainly Correct."*

Respondents argue that the decision of the Seventh Circuit is "plainly correct" and constitutes the "only plausibly

[2] Both Messrs. Heinz and Schmitt were 39 years old when they began receiving pension benefits.

defensible interpretation of the anti-cutback rule." (Opp. 15). In fact, both the Fifth Circuit in *Spacek* and the Seventh Circuit in this case below declare that their respective (and contrary) interpretations of the same statutory provision involving the same legal issue is "plainly correct."[3] Clearly, both Courts cannot appropriately embrace the notion of "plain language" and come down on opposite sides of the issue. The need for a definitive construction of the anti-cutback rule is manifest, not only because the decisions create a conflict between the circuits, but because the decisions are so fundamentally opposed that they create legitimate questions as to the integrity of "plain meaning" analysis.[4]

Respondents next argue that the suspension in this case constitutes a "reduction" for purposes of the anti-cutback rule

[3] The Fifth Circuit states that "[w]hile Spacek's interpretation of Section 1054(g) has some logical appeal, it fails to comport with the plain language of § 1054 (g). . ." and "under the plain language of the statute, a suspension of benefit payments [for disqualifying employment] is not a reduction of early retirement benefits within the plain meaning of Section 1054(g)(2)," *Spacek*, at 289. The Seventh Circuit majority states "that 29 U.S.C. § 1054(g) unambiguously applies to the amendment in this case . . ." (App. 23a) and "this was a reduction of early retirement benefits within the plain meaning of § 1054(g)(2)." (App.10a).

[4] Indeed, Judge Cudahy is just as adamant in his dissent in the case below as the others on the respective panels of each circuit. He refers to the "sometimes tortured contentions of the majority" (App. 24a). that "do violence to the clear intent of the drafters [of the anti-cutback rule]." (App. 31a). Judge Cudahy also surmised that the court in the Sixth Circuit case of *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995), which concluded that a "suspension" was not an "elimination" or "reduction," thought that the conclusion was obvious from the plain meaning of § 1054(g)(2). The fact that the language of the statute creates such extreme discord among the highly respected and considered judges of two reviewing courts only hints at the degree of confusion and uncertainty that the decisions leave in their wake for those pension participants, administrators, trustees, consultants and counselors who must deal with the practical application of such decisions.

akin to amendments made by other plans which were found to violate ERISA § 204(g). *See Michael v. Riverside Cement Co. Pension Plan,* 266 F.3d 1023 (9th Cir. 2001) and *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992). But perusal of each of these case shows that they are clearly inapposite. In *Michael*, the plan originally provided that a participant who retired, returned to employment, and retired a second time would not have his benefit actuarially reduced to account for the prior benefits he received. The Ninth Circuit found that an amendment to that plan which required an actuarial *reduction* of the participant's monthly pension benefit violated ERISA's anti-cutback rule. Similarly, in *Hickey*, the Seventh Circuit found that a plan amendment reducing benefits by eliminating the cost-of-living-adjustment component of such benefits also violated the anti-cutback rule. The distinction between *Michael* and *Hickey* and the instant case is obvious: the former two cases involved a "reduction" in the calculation of participants' monthly benefits, not a "suspension" of those benefits.

Similarly, Respondents' attempt to demonstrate the fallacy of the *Spacek* holding through a "simple hypothetical" is equally inapposite. Respondents suggest that under Petitioner's (and, thus *Spacek's*) approach, a pension plan could simply adopt an amendment ending all early retirement benefits for 18 months as long as it called it a "suspension." The cessation of benefit payments in Respondents' hypothetical example is unrelated to any return to disqualifying employment by the early retirees which is, of course, the issue at bar.

Respondents' reference to *Michael* and *Hickey* and their use of the hypothetical example miss the point. *Spacek*, as set forth in the Petition, is in accord with statutory language, legislative history, applicable regulations and the position of the Internal Revenue Service in concluding that a

"suspension" of early retirement benefits based on disqualifying employment rules is not an "elimination" or "reduction" of benefits which would violate the anti-cutback rule. The Seventh Circuit in the case below completely rejected the *Spacek* analysis, holding that a "suspension" was a "reduction" or "elimination" for purposes of the anti-cutback rule by expanding the concept of "pension benefits" to include the qualitative conditions of post-retirement employment opportunities.

The stark conflict between the circuits and the immediate adverse impact on multiemployer pension plans throughout the United States, as amply illustrated by the *amicus curiae* briefs filed herein, demonstrate the importance of this Court's review to resolve this significant ERISA issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioner,

v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

Although the Solicitor General recommends that this Court grant certiorari to review the Seventh Circuit's decision below (see U.S. Br. 16), he fails to respond to our explanation for why review is unnecessary.

1. The Solicitor General barely engages our argument (Br. in Opp. 9-13) that there very well may not be a circuit split at all on the question whether changes in the rules governing the suspension of early retirement benefits violate ERISA. First, he does not dispute that the Sixth Circuit's comments on the question in *Whisman* v. *Robbins*, 55 F.3d 1140 (1995), are dicta. See Br. in Opp. 7 n.2. Second, while the Solicitor General may be correct in claiming that the panel of the Fifth Circuit that decided *Spacek* v. *Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), believed that its decision "was *not* in tension with that court's earlier decision in [*Harms* v. *Cavenham Forest Industries, Inc.*, 984 F.2d 686 (5th Cir. 1993)]" (U.S. Br. 14) (emphasis in U.S. Br.), that is not the relevant question. Rather, the appropriate inquiry is whether a panel of the Fifth Circuit in the future would be bound by *Spacek*. As we have explained, the *Spacek* court's decision is not binding, because its analysis is inconsistent with the Fifth Circuit's prior decision in *Harms*. See Br. in Opp. 10-11; Robert B. Lamb, *Early Retirement Benefits and the Arbitrary and Capricious Standard Under ERISA in* Spacek *v.* Maritime Ass'n, 32 CREIGHTON L. REV. 1721, 1748-1749 (1999) ("*Harms* would support Spacek's argument that [section 204(g)] shields him from subsequent amendments."). Thus, there is no circuit split to justify this Court's review.

2. Relying entirely on the say-so of one of the *amici*, the Solicitor General asserts that this case "has substantial recurring importance." U.S. Br. 15. But wishing does not make it so. As we explained in our Brief in Opposition (at

13), ERISA contains a "substantial business hardship" exception (ERISA § 302(c)(8)), which exists precisely to protect a plan in situations where a plan's financial stability is threatened by, among other reasons, some detail of the plan – including its suspension-of-benefits rules. But unless a plan invokes this exception, ERISA protects defined-benefit plan members from *ex post* changes, and instead puts the risk of excessive costs on the employers.

The claim of importance is also belied by the fact that this issue has been litigated with great infrequency since the anti-cutback rule was extended to early retirement benefits by the Retirement Equity Act of 1984 (see Pub. L. No. 98-397, § 301(a)(2), 98 Stat. 1451). To the best of our knowledge, the question has reached the courts of appeals on only three occasions – in this case, in *Spacek*, and in *Whisman* – in almost twenty years. Thus, the question cannot have substantial recurring importance.

Finally, the fact that a few pension funds may be subject to the jurisdiction of both the Fifth Circuit and the Seventh Circuit (see U.S. Br. 16) is also not sufficient to make this case an important one. In the computer age, the (putatively) different rules that apply in these two circuits could be implemented without any problem. In any event, it is trivially easy for a plan to behave in a manner that is lawful in both circuits; the plan merely needs to choose not to attempt to implement a retroactive modification in its early-retirement-benefit suspension rules.

3. On the merits, the Solicitor General has merely adopted the analysis of the *Spacek* court lock, stock, and barrel. See U.S. Br. 7-10. But again, we have already explained why that reasoning is flawed. See Br. in Opp. 15-18. Like the *Spacek* court, the Solicitor General insists on conflating two distinct questions: first, whether a pension fund may include rules that provide for the suspension of early retirement benefits for specified post-retirement

employment; and second, whether the pension fund may *change* those rules as they apply to individuals whose benefits have already vested. No one disputes that the first is allowed; that is the point of Representative Clay's floor comments, as well as of Internal Revenue Manual § 4.72.14.3.5.3(7). See Br. in Opp. 18; U.S. Br. 9. But the fact that a pension fund may be drafted to allow for the suspension of benefits does not mean that the plan should also be able to change those rules and apply them to beneficiaries whose benefits have vested and who have already retired. In fact, the Treasury regulation that the Solicitor General cites in his brief (at 13) stresses this very point:

> The addition of employer discretion or objective conditions with respect to a section 411(d)(6) protected benefit *that has already accrued* violates section 411(d)(6). Also, the addition of conditions * * * or any change to existing conditions with respect to section 411(d)(6) protected benefits *that results in any further restriction* violates section 411(d)(6).

26 C.F.R. § 1.411(d)-4 Q&A-7 (emphasis added).

When Messrs. Heinz and Schmitt chose to retire, they did so on the understanding that their pension fund provided them specified early retirement benefits. Those retirement benefits are defined not merely by the dollar sum to which they are entitled in any given month, but also by the rules that govern when they will receive benefit payments. An alteration in these rules "has the effect" of "reducing" (ERISA § 204(g)(2)) the value of these benefits, just as an alteration in the dollar amount of those benefits would reduce their value. Thus, the Seventh Circuit correctly held that petitioner violated ERISA by modifying its early-retirement rules.

4. Finally, if there were any doubt about whether to grant certiorari, an additional consideration supports denial: This case has been in limbo for the surprising seven months that it took the Solicitor General to file his brief. During that period the individual respondents have continued to be denied the pension income to which they are entitled. The case should therefore be brought to a quick resolution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONER

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of employee benefits legislation and regulations promulgated to implement the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. § 1001, *et seq.*, and other laws affecting multiemployer plans.[1]

[1] Pursuant to Rule 37.6 of the Rules of the Court, the undersigned hereby state that no counsel for Petitioner or Respondents authored

Currently, 309 multiemployer pension plans are affiliated with the NCCMP. These affiliated plans cover a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. The NCCMP has frequently participated as *amicus curiae* in the United States Supreme Court and the federal courts of appeal.

Multiemployer plans provide pension coverage for some ten million American workers, one-fifth of all workers who participate in pension plans. Congress has recognized that the continued well-being and security of employees, retirees and their dependents are directly impacted by multiemployer plans, and that interference with the maintenance and growth of such plans is contrary to the national public interest. 29 U.S.C. §§ 1001(a)(1), (3) and (c)(2).

The decision below, if allowed to stand, will significantly detract from the ability of plan trustees to employ ERISA's "suspension of benefit" rules in response to fluctuating employment and retirement patterns, while at the same time making subsidized early retirement benefits available to those participants who need them the most. The applicable statutes, regulations and regulatory interpretations have long allowed pension plans a degree of flexibility when defining the scope of work an early retiree may engage in without foregoing receipt of his retirement benefits. The decision of the two-member majority below—in direct conflict with the unanimous decisions of two sister circuits—will restrict the historical ability of multiemployer pension plans to tailor such suspension of benefit provisions to current employment conditions, and hence to protect the actuarial soundness of these plans.

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any part of this brief. Moreover, no person or entity other than the NCCMP made a monetary contribution to the preparation or submission of this brief.

Further, the decision below will effectively force multiemployer pension plans throughout the country to review existing early retirement provisions and, very likely, to enact plan amendments that conform to the rule announced by the two-member majority below, notwithstanding the fact that a contrary rule prevails in two other circuits. Such a process will impose unnecessary administrative burdens on these plans, and may well come at the expense of enhanced early retirement options and future benefit increases for participants.

Accordingly, the NCCMP and its constituent groups have a strong interest in supporting the granting of the petition herein and in urging the reversal of the decision below. The NCCMP believes that a resolution by this Court of the conflict between the circuits will serve to ensure that multiemployer pension plans continue to have the flexibility they require to determine the conditions under which early retirees can continue to collect a pension while receiving income from current employment. Both Petitioner and Respondents have consented to the filing of this brief, as is evidenced by letters of consent that have been filed with the Court.

INTRODUCTION

The decision below concerns the extent to which a multiemployer pension plan may revise its rules pertaining to suspension of early retirement benefits when a retiree reenters employment. Under section 203(a)(3)(B) of ERISA, a multiemployer plan may include provisions suspending retirement benefits when the retiree returns to work in the same industry, in the same trade or craft, and in the same geographic area covered by the plan.[2] Multiemployer plans

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[2] Section 203(a)(3)(B) provides, in relevant part, that—

> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan

commonly refer to employment that will trigger suspension of benefits as "disqualifying employment." (App., at 4a.) When a retiree re-enters disqualifying employment, ERISA § 203(a)(3)(B) provides that the plan's withholding of that retiree's benefit will not be deemed a forfeiture of an accrued benefit under section 203(a) of the Act, 29 U.S.C. § 1053(a).[3]

Since 1981, regulations promulgated by the Department of Labor pursuant to section 203(a)(3)(B)[4] have specified a range of permissible definitions of disqualifying employment. Multiemployer plans may adopt suspension of benefit rules restricting post-retirement employment to the full extent

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provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

* * *

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed."

29 U.S.C. § 1053(a)(3)(B) and codified as section 411(a)(3)(B) of the Internal Revenue Code, 26 U.S.C. § 411(a)(3)(B). Multiemployer pension plans are subject to Title II of ERISA (codified as amendments to the Internal Revenue Code ("Code")), which duplicates portions of Title I of ERISA (codified at Title 29 of the U.S.C.) including ERISA's provisions on vesting and accrual. Under Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47713, the Internal Revenue Service was given authority over ERISA's funding, participation, vesting and benefit accrual provisions.

[3] *See* Suspension of Benefits Rules, 43 Fed. Reg. 59098, 54099 (proposed Dec. 13, 1978) (to be codified at 29 CFR Part 2530) (Preamble to proposed DOL suspension of benefit rules wherein the agency explained that "the inclusion of the suspension provisions in section 203(a)(3) of the Act indicated that Congress intended to permit plans to provide for the permanent withholding of pension benefits under certain circumstances."

[4] *See* 29 CFR § 2530.203-3 *et seq.*

permitted under the regulations, or they may narrowly tailor restrictions on post-retirement employment to certain types of employment that fall somewhere within the range permitted by the regulations, or they may choose not to restrict post-retirement employment at all. Trustees of multiemployer pension plans have come to regard suspension of benefit rules as an important element of plan design which offers them flexibility in regulating early retirement benefits, if needed.

Relevant considerations such as industrial stability, conditions of employment and earnings, and the actuarial soundness of pension plans are not fixed in time but are impacted by wide fluctuations in unemployment rates, the relative aging of a workforce, the vagaries of financial markets, or other unforeseen events that impact the entire economy, specific industries or particular regions. The trustees of multiemployer pension plans, representing both labor and management,[5] are uniquely qualified to assess those circumstances insofar as they are pertinent to their own plans at any given time. Using that expertise, the trustees can employ a suspension of benefit provision as a dynamic and adaptable tool for addressing a number of economic exigencies. This approach is completely in keeping with Congress's intent in adopting section 203(a)(3)(B).[6]

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[5] *See* section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5).

[6] *See, e.g.*, 120 Cong. Rec. 29192, 29197 (daily ed. Aug. 20, 1974) (statement of Rep. Dent), *reprinted in* 3 Leg. Hist. At 4669:

[T]he conferees expressly provided in section 203(a)(3)(B) that a plan be permitted to suspend benefits under certain circumstances. This section further authorizes the Secretary [of Labor] to prescribe regulations necessary to carry out the purposes of this provision. It is contemplated that those regulations would permit a plan's provisions concerning suspension to take into account the particular facts and circumstances of the industry; the objectives of industrial stability; the conditions of employment and earnings in the industry; the benefit payment period of the plan; and the burden of onerous

The decision below neither considers these realities nor acknowledges the underlying purpose of section 203(a)(3)(B). If left intact, it will significantly restrict the manner in which the trustees of multiemployer pension plans may exercise the discretion granted them under ERISA's suspension of benefit provision. It achieves this harmful result by construing a "suspension" under section 203(a)(3)(B) of ERISA as the equivalent of an "elimination" or "reduction" of early retirement benefits in violation of section 204(g) of ERISA.[7] The decision is in direct conflict with the construction given the statute by the Internal Revenue Service—the administrative agency charged with its

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and costly administrative procedures imposed upon the plan by these provisions.

See also 120 Cong. Rec. 29928, 29930 (daily ed. Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* 3 Leg. Hist. At 4738:

> The type of suspensions contemplated by this provision are those which prevent plan assets from being used to pay retirement benefits to persons who have, in fact, returned to work for employers covered by the plan. Also contemplated are provisions designed to protect participants against their pension plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of employees covered by the plan. . . .

And 120 Cong. Rec. 29928, 29942 (daily ed. Aug. 22, 1974) (statement of Sen. Javits), *reprinted in* 3 Leg. Hist. At 4772:

> The purpose of this limited exception to what is generally a rule precluding divestiture of vested benefits is to protect unions against undercutting of wage scales and the additional expense generated by the need to subsidize retirement benefits for those who have left the work force as well as retirement benefits for those continuing to work—if such a course was required. . . . The purpose of the suspension rule is to protect the legitimate interests of the union with respect to those persons who have really not retired and not to penalize retirees where, on balance, the interests of the union are not adversely affected to a substantial degree.

[7] 29 U.S.C. § 1054(g); 26 U.S.C. § 411(d)(6).

enforcement—and the prior decisions of the Fifth Circuit in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), and the Sixth Circuit in *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995).

SUMMARY OF REASONS FOR REVIEW

Since the enactment of ERISA many multiemployer pension plans have used ERISA section 203(a)(3)(B) as a means of encouraging or discouraging returns to employment by early retirees in the relevant industry. The section was intended as a tool to deal with the economic exigencies that may affect a particular industry or a plan's actuarial soundness at any given time. For suspension of benefit rules to be effective over time, multiemployer plans must have the flexibility to expand the scope of disqualifying employment when economic conditions warrant, in order to maintain the actuarial soundness of the plan and to protect the welfare of actual retirees, active non-retired participants, and contributing employers.

Relying on the statute, prior court decisions and IRS guidance, trustees of multiemployer pension plans have after amended plans to expand definitions of disqualifying employment without reason to fear they might be violating the anti-cutback rule of ERISA section 204(g), the provision erroneously relied upon by the majority below. The decision below places a new and completely unwarranted constraint on the trustees' ability to tailor their suspension of benefit rules to changing economic conditions. The trustees of the many multiemployer pension plans that have expanded definitions of "disqualifying employment" through amendment must now assess which circuit's law might conceivably apply to such amendments, whether further plan amendments should be adopted, and even whether it is administratively feasible to bifurcate "disqualifying employment" rules on a circuit-by-circuit basis. This is flatly contrary to the salient purpose of

Congress, vigilantly enforced by this Court, that ERISA plans be subject to a nationally uniform set of rules that will avoid such administrative nightmares.

If the ruling below is allowed to stand, it will likely compel most trustees to reform their plans and review and amend current suspension rules, if only in an excess of caution. It is contrary to the national interest to allow the opinion of a two-judge majority to trigger the imposition of such a substantial administrative burden and expense on hundreds of pension plans serving one-fifth of all American pension participants. Unfortunately, the decision will also probably serve as a deterrent to adoption of any but the strictest of suspension of benefit rules. And, because the actuarial soundness of many plans will be adversely impacted by administrative efforts to comply with the Seventh Circuit's decision, sponsors of these plans likely will be compelled to adopt amendments calling for significant reductions in the rate of future benefit accruals for all plan participants.

REASONS FOR REVIEW

I. THE DECISION BELOW, IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH AND SIXTH CIRCUITS, WILL HAVE IMMEDIATE AND SERIOUS ADVERSE CONSEQUENCES FOR MULTIEMPLOYER PENSION PLANS NATIONWIDE.

A principal goal of ERISA was to enable plan sponsors to establish and maintain a uniform administrative scheme for disbursement of benefits. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). As this Court has recognized, such uniformity is impossible if plans are subject to different legal requirements in different parts of the country. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). Obligating a plan to satisfy a regional rule pertaining to benefits that is more costly than rules in effect elsewhere either puts the plan to the

administrative burden of adopting different rules for different regions, or forces it to structure its entire system of benefits to the "least common denominator" rule of a particular region, contrary to ERISA's statutory scheme. *See Fort Halifax Packing Co.*, 482 U.S. at 10, discussing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). That is precisely the potential result in this case, since multiemployer plans will have to consider whether they will attempt to somehow comply with two distinctly different rules of law or whether they will simply conform to the least common denominator, to the potential detriment of the great majority of plan participants.

A. Suspension of benefit rules are a key component of most multiemployer plan provisions providing for early retirement benefits.

Multiemployer plans fill an important need in industries (such as construction or trucking) which are characterized by irregular employment or frequent shifts of workers between employers. Multiemployer plans also serve as a vehicle for providing benefits at an affordable cost in industries dominated by small employers, such as garment manufacturers, restaurants and service establishments.

In addition to providing workers in such industries with benefit portability, which allows employees to move from employer to employer without penalty, multiemployer plans help protect workers from the potentially devastating consequences of business downsizing, mergers and closings. Multiemployer pension plans continue even if particular employers go out of business, so that workers who lose their jobs in such circumstances remain protected in their pension benefits. Because of the often transitory nature of their employment and/or the small size of their employers, many employees would be unable to participate in any employee benefit plan were it not for the existence of multiemployer plans.

Another characteristic of multiemployer pension plans, especially those providing benefits to participants in the construction industry and related trades and crafts, is that they typically offer early retirement benefits, which are often subsidized, *i.e.,* the benefits are not actuarially reduced to account for early retirement.[8] As illustrated in the case below, a participant who will not reach normal retirement age under a plan for many years will nonetheless be eligible for a subsidized early retirement benefit if he or she has completed a minimum number of years of service.[9] Because the benefits are subsidized, they are more expensive to the plan than benefits provided on or after normal retirement age.

The trustees of the Petitioner multiemployer plan amended the plan in 1998 to expand the definition of disqualifying employment to include work "in any capacity in the construction industry" to discourage a high rate of early retirement that was causing actuarially significant losses to the plan. This is a useful mechanism in industries of a cyclical nature, like construction, and potentially in any industry experiencing the vagaries of the current economy. A

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[8] *See, e.g.,* 144 Cong. Rec. 7574, 7578 (daily ed. July 7, 1998 (statement of Sen. D'Amato):

> [C]onstruction work is physically hard, and is often performed under harsh climatic conditions. Workers are worn down sooner than those in most other industries. Often, early retirement is a must. Multiemployer pension plans accommodate these needs of their covered workers by providing for early retirement, disability, and service pensions that provide a subsidized, partial or full pension benefit.

[9] The Respondents were each 39 years old when they qualified for the Petitioner plan's "service-only pension." To be eligible for the service-only pension, a participant had to have earned 30 or more pension credits. Normal retirement age under the plan was 65. Nevertheless, the service-only pension provided the Respondents with monthly benefit payments that were not actuarially reduced to account for payments which began at an earlier age and which would continue for a longer period. (Petitioner's Brief, p. 3; App., 4a.)

flexible suspension of benefits rule can be used to encourage early retirement pensioners to re-enter the workforce at times of economic boom and, conversely, to discourage "double dipping"[10] during times of economic downturn.[11]

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[10] The majority's opinion chides the Fund for pointing out that broadening the definition of disqualifying employment was necessary to curb the practice of "double dipping," which was causing a depletion of Fund assets. The majority apparently believed that the Fund was criticizing a practice which existed under the plan before the amendment, *i.e.,* receipt of an early retirement benefit by retirees who were not actually retired from the industry. (App. 10a-11a, n.6.) This misses the point that a certain level of double dipping may be acceptable and even desirable in times of high employment when, for example, a shortage of skilled journeymen may be plaguing a particular trade or craft and a pool of able-bodied retirees can be a welcome source of qualified journeymen. However, when bleaker economic conditions prevail, double dipping works a hardship on multiemployer plans, the predominant number of which are defined benefit plans. Defined benefit plans must continually meet ERISA's minimum funding standards (section 412 of the Code) notwithstanding the facts that (1) plan assets are typically invested in equity and fixed income securities subject to the vagaries of Wall Street, and (2) the ongoing funding of such plans is dependent upon the flow of employer contributions based on hours worked by employees, even in times of high unemployment.

[11] To illustrate the usefulness of occasional adjustments in a plan's definition of disqualifying employment, one may consider the examples of a multiemployer pension plan that provides a subsidized early retirement benefit to participants with at least 20 years of service. For a number of years the plan includes a suspension of benefit rule that defines disqualifying employment to the full extent provided under Department of Labor regulations. In 1995, a 42 year old participant who has earned 20 years of service under the plan retires and begins receiving benefits. He cannot return to employment covered by the plan without having his benefits suspended. In 2000, employers contributing to the plan raise concerns that there is a shortage of qualified construction workers. To encourage retirees like the participant to return to covered employment, the trustees of the plan decide to amend the plan to provide that retirees who return to employment covered by the plan will not have their benefits suspended. In 2002, unemployment among construction workers spikes upward while the reemployed participant and numerous other retirees

Prior to the Seventh Circuit's decision below, multi-employer pension plans were able to, and did, act to expand and contract definitions of disqualifying employment through plan amendment, based on statutory, regulatory and judicial precedent clearly authorizing such actions. *See Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998) and authority cited therein; *Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir. 1995).

B. The decision below, and its direct conflict with the law in other circuits, will place an unacceptable administrative burden on multi-employer plans, to the detriment of millions of plan participants.

The decision below will clearly and directly impact the administration of multiemployer pension plans that are either administered in the states of Illinois, Indiana and Wisconsin, or that have participants working or residing in those states. Moreover, given ERISA's liberal venue provision whereby a suit may be brought (1) where the plan is administered; (2) where the breach took place; or (3) where a defendant resides or may be found,[12] it is conceivable that a suit challenging an amendment similar to those considered by the

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continue working in covered employment *and* receiving subsidized early retirement benefits (double dipping). To protect unemployed participants of the plan who are neither eligible for retirement benefits nor, at the time, accruing service credits towards retirement, the trustees choose to expand the definition of "disqualifying employment" to again include employment covered by the plan in order to discourage double dipping and reduce unemployment among active participants.

[12] ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2); *see also Varsic v. United States District Court for the Central District of California*, 607 F.2d 245, 248 (9th Cir. 1979) (giving liberal interpretation to ERISA's venue provision).

courts in *Spacek* and *Heinz* could be brought against almost any multiemployer plan in a federal court in Illinois, Indiana or Wisconsin.

The conflict between the circuits places trustees of multi-employer plans in an untenable position in the event they either seek to amend or have previously amended a plan to expand the definition of disqualifying employment. Trustees of plans that are either administered in the Seventh Circuit or have a large number of participants in the region will have little choice but to amend their plans to comply with the holding of the two-judge majority below, notwithstanding the nationwide weight of authority to the contrary.

Other plans face a more perplexing dilemma. For trustees of plans administered outside the Fifth, Sixth or Seventh Circuits, and which have little or no contact with those circuits, the decision to amend a plan or enforce an existing amendment that expands the definition of disqualifying employment cannot be made without acknowledging the conflict between the circuits.[13] Trustees must then decide whether the plan should assume the risk of litigation and enforce these provisions or submit *de facto* to the authority of the two-judge majority below, which significantly restricts the ability of the plan to adapt to changing employment conditions.

Similarly, large nationwide plans not administered in the Seventh Circuit, but with participants residing within the Seventh Circuit, must either bow to the least common

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[13] It is important to keep in mind that the suspension of benefit provision of a plan must be read in the context of the entire plan. In this regard, the impact of the decision below is not limited to the administration of the plan, but also goes to the trustees' consideration of benefit improvements. If the trustees heed the Seventh Circuit's holding, they will be required to reconsider generous early retirement benefits for reasons of actuarial soundness. It is thus likely that retirees will be penalized by the plan's need to accommodate the ruling below.

denominator and adhere to the ruling below, or attempt to craft a piecemeal approach to their suspension of benefit rules, an administratively burdensome task which would be all but impossible to accomplish.[14] This Court has previously decried such results, in which conflicting rules of law force a plan either to adhere to the least common denominator or to adopt an administratively burdensome scheme at the possible sacrifice of higher benefit levels in the future. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 10-11.

From an administrative standpoint, the NCCMP cannot foresee a multiemployer plan overcoming the practical difficulties of establishing a scheme for complying with both *Heinz* and *Spacek/Whisman*. Unless the Court grants this petition and resolves the conflict, trustees of many multiemployer plans may feel compelled to amend their plans to comply with the decision below, incurring significant administrative costs and potentially jeopardizing future benefit increases.

The adverse impact of the majority opinion below is hardly limited to the administrative burden it will create for plan trustees. The decision also strips multiemployer plans of an effective tool trustees have relied on for over thirty years to help safeguard the actuarial soundness of such plans and to protect contributing employers and their employees. In so doing, the court below has placed the interests of reemployed early retirees over the interests of all other plan participants

[14] The *Heinz* decision leaves fund administrators to ponder a number of questions. For example, if a plan opts to apply *Heinz* only in cases within the jurisdiction of the Seventh Circuit, should it look to where the retiree resides or where "disqualifying work" is performed? If a retiree in Illinois moves to Pennsylvania, or vice versa, which rule should apply? And, if a plan opts to apply *Spacek* only to retirees residing in Mississippi, Louisiana and Texas, how should retirees who relocate to Texas be treated? These conundrums underscore the reason Congress sought to avoid a "patchwork scheme of regulation" in the first place. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 11.

(including active employees, unemployed participants and actual retirees), and the employers who contribute to such plans. As a consequence, the court has frustrated the primary purpose of Congress when it included section 203(a)(3)(B) in that Act.

II. THE DECISION BELOW IS NOT ONLY IN CONFLICT WITH THE LAW OF OTHER CIRCUITS, IT DIRECTLY CONTRADICTS AUTHORITATIVE INTERPRETATIONS OF THE INTERNAL REVENUE SERVICE.

The Petitioner fairly details the deficiencies that underscore the Seventh Circuit's reasoning that a "suspension" under ERISA section 203(a)(3)(B) equates to a "reduction" under ERISA section 204(g).[15] The Petitioner correctly observes that the reasoning of the decision below contradicts the language of the statute, applicable legislative history, and—an issue focused on herein—applicable regulations and the authoritative position of the Internal Revenue Service.

The majority opinion below "rejects as unpersuasive" IRS guidance provided to its field examiners that "[a]n amendment that reduces I.R.C. 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate I.R.C. 411(d)(6)."[16] Multiemployer Plan Examination Guidelines of the Internal Revenue Manual, at 4.72.14.3.5.3(7) ("Suspension of Benefits") (May 4, 2001) (available on WESTLAW RIA-IRM database) (hereinafter "Multiemployer

[15] Judge Cudahy, in dissent, persuasively refutes the reasoning of the majority opinion.

[16] If such an amendment did violate section 411(d)(6) of the Code, the plan would be treated as not satisfying the requirements of ERISA's minimum vesting standards and would risk losing its tax qualified status. *See* Code section 411(d)(6)(A) ("A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan. . .").

Plan Guidelines"). According to the majority, a "single statement" in the IRS manual cannot be deemed to represent a longstanding agency interpretation. (App. 22a n.17.)

The majority's analysis, however, overlooks several significant points. First, the Multiemployer Plan Guidelines set forth the technical guidance for the Service's field personnel, technical staff, and plan determination personnel. Multiemployer Plan Guidelines, at 4.72.14.1. The provision noted by the court is in fact one of seven detailed subsections dedicated solely to the examination of a multiemployer plan's suspension of benefit provisions. *Id.* 4.72.14.3.5.3(1), *et seq.* Second, the final Multiemployer Plan Guidelines were issued (post-*Spacek*) by the Service after it published proposed examination guidelines with a request for public comment. *See* Revenue Service Announcement 96-25 (Apr. 8, 1996). Finally, the court's intimation that the position taken by the IRS in the Multiemployer Plan Guidelines was not fully thought through fails to recognize that the provision is consistent with and, indeed, complements Treas. Reg. 1.411(c)-1(f), a regulation previously promulgated by the Service. The regulation provides that "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B) of [ERISA]. . . ." Accordingly, it is clear that the IRS considers a suspension under section 203(a)(3)(B) not to constitute a reduction in a participant's accrued benefit, contrary to the majority opinion below.

Clearly, the IRS guidance set forth in the Multiemployer Plan Guidelines is worthy of a degree of deference not afforded it by the majority below. *See Christensen v. Harris County*, 529 U.S. 576, 590-91 (2000) (Scalia J. concurring) (listing cases where this Court accorded deference to authoritative agency guidance in various forms).

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges the Court to review the decision below.

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IN THE

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CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF CENTRAL STATES

The Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Sections 3(37) and 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1002(37) and 1301(a)(3).[1] Central States is the largest

[1] Pursuant to Rule 37.6, Central States represents that this brief has been authored solely by counsel for Central States and no party other than Central States has made a monetary contribution for the preparation or submission of this brief.

multiemployer defined benefit pension plan in the United States with assets of $19.7 billion.[2] Central States has over 187,000 active participants, over 75,000 vested inactive participants, and over 199,000 retirees. These participants and retirees reside in every judicial circuit in the United States. For example, as of November 6, 2002, Central States had over 35,000 active participants residing in the Seventh Circuit (Illinois, Indiana, and Wisconsin) and over 16,000 active participants residing in the Fifth Circuit (Louisiana, Mississippi, and Texas).

Like most multiemployer defined pension plans, Central States has prohibited reemployment rules. These rules provide that a retiree that engages in prohibited reemployment, for example, working in a position similar to positions covered by collective bargaining agreements in effect in the same geographic area, will have his pension suspended during the duration of the prohibited reemployment. This prevents retirees from "double dipping," *i.e.*, drawing a pension while continuing to do work in the same industry from which the retiree just "retired." On March 13, 2002, Central States amended its pension plan, effective July 1, 2002, to provide a broader definition of prohibited employment for any participant retiring after the effective date of the amendment.[3] In other words, more jobs would be encompassed within the definition of prohibited reemployment,

[2] All data is as of December 31, 2001, except as otherwise indicated.

[3] Unlike the amendment adopted by Petitioner, Central States did not apply its amendment to existing retirees. However, the conflict between the Fifth Circuit and the Seventh Circuit affects Central States' amendment as well because the reasoning of the Seventh Circuit would likely prohibit the application of the amendment even as to participants who had not retired as of the effective date of the amendment. *See Heinz*, 303 F.3d at 806 n.6 (suggesting that its holding is not limited to those already retired before the amendment by indicating that the amendment could apply prospectively to the "benefit payment attributable to service after the amendment").

thereby making it more likely that a retiree's pension benefits would be suspended. In enacting the amendment to the prohibited reemployment rules, Central States' Board of Trustees relied in part on the Fifth Circuit's decision in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), which held that suspensions of benefits under prohibited reemployment rules are not subject to the "anti-cutback" provision of ERISA, 29 U.S.C. 1054(g).

Subsequent to Central States' decision to amend the prohibited reemployment rules, the Seventh Circuit in the instant case held that a suspension of benefits is subject to the anti-cutback provision of ERISA. *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002). As a result, Central States and its participants are potentially subject to two different rules. On the one hand, if the Fifth Circuit's approach is followed, Central States' amendment to the prohibited reemployment rules is valid. However, if the Seventh Circuit's approach is followed, Central States is at risk that a court would find the amendment to the plan constitutes a cutback in benefits prohibited by 29 U.S.C. § 1054(g). Central States has thousands of participants in both the Fifth and the Seventh Circuits, making the conflict particularly severe in its application. As a result, Central States is in a conundrum when it must make a benefit determination concerning a suspension of benefits. If Central States applies a different rule to participants based upon the participant's circuit of residence, there is a risk that Central States' benefit determination would be found to be arbitrary and capricious because a different rule would be applied to similarly situated participants with no distinction in their benefit claims except for their place of residence. Similarly, because ERISA's venue provision provides that venue is appropriate, among other places, "where the plan is administered," 29 U.S.C. § 1132(e)(2), a participant may choose to sue Central States within the Seventh Circuit (where Central States is administered) even though the participant may reside

in a different judicial circuit. In short, Central States is caught between the Scylla of risking an arbitrary and capricious finding should it apply the rule based upon circuit of residence and the Charybdis of being prevented from applying the amendment even though Central States believes that the amendment is not subject to the anti-cutback rule.[4]

SUMMARY OF REASONS FOR GRANTING THE WRIT

There is a conflict between the decision below, *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002), and the Fifth Circuit's decision in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), on the question of whether an amendment to rules regarding prohibited reemployment constitutes an impermissible cutback of accrued benefits in violation of 29 U.S.C. § 1054(g)(2). This conflict regarding this important issue has created legal uncertainty making it impossible for pension plans to be administered. Should the plan follow *Heinz*, it will be at risk of being found to violate the terms of the plan (by failing to apply the amendment). If the plan follows *Spacek*, the plan is at risk of being found to have impermissibly cutback an accrued benefit. However, as a close analysis of the pertinent statutory sections and regulations demonstrates, the application of prohibited reemployment rules to suspend pension benefit payment does *not* affect the calculation of a participant's accrued benefit. Since 29 U.S.C. § 1054(g)(2) is violated only by an amendment that "reduces" or "eliminates"

[4] In part because of this dilemma and the legal uncertainty surrounding this issue, Central States has recently rescinded the amendment to the prohibited reemployment rules. Thus, until this Court agrees to resolve the conflict between the circuits, Central States would be deterred from taking an act that it believes is allowed under ERISA. Central States' determination as to the best way to structure its plan in the interests of preserving assets and serving its participants has been unnecessarily chilled by the legal uncertainty and conflict created by the *Heinz* decision.

an accrued benefit, a suspension of benefits, by definition, does not violate the statute because a suspension of benefits does not affect the amount of a participant's accrued benefit at all. The Court should grant the Petition for a Writ of Certiorari to resolve the legal uncertainty regarding this issue.

REASONS FOR GRANTING THE WRIT

As the Court below acknowledged, there is a clear split between the Fifth Circuit's decision in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), and the Seventh Circuit's decision below on the issue of whether an amendment to the rules regarding prohibited reemployment for early retirement constitutes a cutback in accrued benefits in violation of 29 U.S.C. § 1054(g)(2). *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 803 & n.1 (7th Cir. 2002). The decision below also conflicts with the Sixth Circuit's decision in *Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir. 1995), which held that an amendment to prohibited reemployment for early retirement does not violate 29 U.S.C. § 1054(g) because a suspension of benefits is separate and distinct from an elimination or reduction of benefits. Resolution of this conflict between the circuits on a pure question of law is the paradigm case for granting certiorari.

The issue is also one of critical importance. Until this Court resolves the issue, pension plans and their participants alike will be uncertain as to their rights. Because a single plan such as Central States may have participants throughout the country, it is impossible for a plan to make consistent benefit determinations without either risking a determination that enforcement of an amendment constitutes a cutback, or risk violating the terms of the plan by applying one version of the plan to certain participants and another version of the plan to other participants based solely on the participant's place of residence. Because ERISA's venue provision, 29 U.S.C. § 1132(e)(2), permits venue, among other places, "where the

plan is administered," and where the participant "may be found," the choice of forum will be outcome determinative, and reaching the courthouse door first, rather than the rule of law, will be paramount.

In addition to the prejudice to plans and participants through a delay in resolving this issue, delay in resolving this issue will not result in further assistance to the Court in resolving the issue. As stated above, the question presented is a pure question of law that is not dependent on a variety of factual circumstances to bring the question of law into focus. Simply put, the question is whether, under ERISA, a suspension of benefits should be treated the same as a reduction or elimination of benefits. As illustrated below, the Seventh Circuit was incorrect in equating a suspension of benefits with a reduction or elimination of benefits.

As detailed in *Spacek*, ERISA itself, its regulations, and the legislative history all distinguish a suspension of benefits from a reduction or elimination of accrued benefits. For example, Section 203(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1053(a)(3)(B)(ii), classifies prohibited reemployment rules as a suspension of benefits, and expressly provides that a benefit suspended under a prohibited reemployment rule "shall not be treated as a forfeitable accrued benefit." In addition, various statutory and regulatory provisions refer to both reductions of benefits and suspensions of benefit payments. *E.g.*, 29 U.S.C. §§ 1441(a), 1341a(d) and 1342(d); 29 C.F.R. § 2520.104b-4(a)(1)(iii). Further, Section 203(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1053(a)(3)(B)(ii), and the regulations promulgated under that provision, provide that for multiemployer plans, suspensions of benefit payments after *normal* retirement age is limited to participants working in the same industry, in the same trade or craft, and the same geographic area covered by the plan. The regulations make it plain that the limitations placed on suspension of benefit payments apply only after a participant reaches *normal* retirement age, and that the limitations on suspension imposed by Section 203(a)(3)(B)(ii) do not apply to the suspension of *early* retirement benefits. 29 C.F.R. § 2530.203-3(a); *Whisman*, 55 F.3d at 1146. Thus, the statute and the regulations give a plan broader authority to suspend benefits prior to normal retirement age.

The regulations also state that with respect to early retirement benefits "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B)." 26 C.F.R. § 1.411(c)-1(f); *Spacek*, 134 F.3d at 290. In other words, a suspension of benefits is treated differently than a reduction of benefits because a suspension of benefits does *not* result in a reduction of the accrued benefit. Therefore, because 29 U.S.C. § 1054(g)(2) only applies if an amendment "eliminates or reduces" an early retirement benefit, and because a suspension is treated as *not* reducing the accrued early retirement benefit, an amendment to the suspension rules does not violate 29 U.S.C. § 1054(g)(2). The Seventh Circuit's conclusion that an amendment of the suspension rules constitutes a cutback is simply wrong because its premise is that a suspension either "reduces" or "eliminates" an accrued benefit. However, because a suspension does not affect the calculation of the accrued benefit for purpose of early retirement, a suspension neither "reduces" nor "eliminates" an accrued benefit. Therefore, an amendment to the suspension rules neither "reduces" nor "eliminates" an accrued benefit because the accrued benefit is unaffected by the suspension rules regardless of the form of those rules.

CONCLUSION

The conflict between the Fifth Circuit and the Seventh Circuit has created a clear split in the circuits on a pure question of law. Absent resolution of this question of law, pension funds will either be forced to forego their right to protect the solvency of the pension funds by broadening the scope of the prohibited reemployment rules, or be subject to conflicting rules concerning whether the amendment should apply to a particular participant. This Court should grant the Petition for a Writ of Certiorari to resolve this critical issue.

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In the Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND, PETITIONER

v.

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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21 pp

QUESTION PRESENTED

The "anti-cutback" rule in Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), generally prohibits any amendment of a qualified pension plan that has the effect of eliminating or reducing an early retirement benefit attributable to services provided by a participant before the amendment.

The question presented is whether an amendment to a multiemployer pension plan that provides for the suspension of the payment of early retirement benefits during the period that a participant, after retiring, is employed by another firm in the same industry is a prohibited elimination or reduction of such benefits when applied to employees who retired prior to adoption of the amendment.

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This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States.

STATEMENT

The "anti-cutback" rule in Section 204(g)(1) and (2) of the Employee Retirement Income Security Act of 1974, (ERISA) provides that the accrued benefit of a pension plan participant may not be decreased by an amendment to the pension plan, and further provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit attributable to service before the amendment shall be treated as a prohibited reduction of accrued benefits. 29 U.S.C.

1054(g)(1) and (2). The court of appeals held in this case that an amendment to a multiemployer pension plan that provides for the suspension of the payment of early retirement benefits during the period that a participant, after retiring, is employed in the same industry is a prohibited elimination or redution of such benefits when applied to employees who retired prior to adoption of the amendment. It is the position of the United States that the ruling of the court of appeals is erroneous and warrants review by this Court.

1. Respondents are participants in a multiemployer defined benefit pension plan that is administered by petitioner Central Laborers' Pension Fund. Respondents retired in 1996, when they were each 39 years old. On their retirements, they qualified for and began receiving monthly benefit payments. Those payments were available to plan participants who retired at any age, so long as they had earned a threshold number of pension credits. The monthly payments available on their retirements were the same as the payments available at normal retirement age. The benefits were not actuarially reduced to take into account the fact that payments that begin at an earlier age would be likely to continue over a longer period. Pet. App. 4a. Under the plan, monthly benefit payments for persons who retire before age 60 are suspended during periods when the retirees thereafter work in certain "disqualifying employment." At the time that respondents retired, the plan defined "disqualifying employment" for this purpose as employment "in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker)." *Ibid.*

After their retirement, respondents obtained jobs as supervisors in the construction industry. That type of employment was not "disqualifying employment" under the plan, and respondents therefore continued to collect their monthly pension benefits. Two years after respondents retired, however, the plan was amended. As amended, the definition of "disqualifying employment" was expanded (for participants who retire before age 53) to include work "in any capacity in the construction industry (either as a union or non-union construction worker)." Pet. App. 5a. The Pension Fund construed this amended definition of "disqualifying employment" to encompass the supervisory work performed by respondents and therefore suspended their monthly benefit payments. *Ibid.*

2. Respondents brought this action against the Pension Fund to obtain payment of the suspended benefits under Section 502 of ERISA, 29 U.S.C. 1132. Respondents contended that the amendment to the definition of "disqualifying employment" under the plan to include supervisory work violates the "anti-cutback" rule of Section 204(g) of ERISA, 29 U.S.C. 1054(g). The "anti-cutback" rule of ERISA imposes requirements that are identical to the requirements of Section 411(d)(6) of the Internal Revenue Code, 26 U.S.C. 411(d)(6). These provisions prohibit a qualified plan from retroactively "eliminating or reducing an early retirement benefit." 29 U.S.C. 1054(g)(2)(A); 26 U.S.C. 411(d)(6)(B)(i).

The district court ruled in favor of the Pension Fund. Pet. App. 33a-45a. Relying on *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998), the court held that the amendment to the pension plan did not violate the anti-cutback rule because it concerned a "suspension" of benefit payments and not a "reduction" of early retirement benefits. Pet. App. 36a-

38a. The court explained that, "unlike a reduction in benefits situation, where benefits are suspended, the suspension is temporary in nature and completely under the control of the retirees who can avoid or terminate suspension of benefit payments by declining or terminating disqualifying employment." *Id.* at 38a.

3. The court of appeals reversed. Pet. App. 3a-31a. The panel majority held that the amendment to the plan resulted in an impermissible "reduction" of early retirement benefits under Section 204(g) of ERISA because respondents lost the right they previously had to receive monthly retirement benefits while they worked as construction supervisors. Pet. App. 9a. Although the court recognized that the "suspension" of benefit payments during such employment was only temporary under the plan, the majority reasoned that the suspension effected a permanent "reduction" for the months that the benefit payments were suspended. The court concluded that this "reduction" of benefits paid to respondents due to the expanded plan definition of "disqualifying employment" violated the anti-cutback rule of ERISA. *Id.* at 9a-10a.

In so ruling, the court expressly rejected the contrary interpretation of the anti-cutback rule adopted by the Fifth Circuit in *Spacek*. Pet. App. 3a-4a.[1] The court explained that, while not all "suspensions" are to be treated as "reductions" of benefits under this statute, "if the suspension is pursuant to an amendment that reduces benefits (attributable to service before the

[1] The court noted that, because its decision conflicts with the decision of the Fifth Circuit in *Spacek*, "it has been circulated * * * to all members of the court in regular active service. A majority did not wish to hear the case en banc." Pet. App. 4a n.1.

amendment), then it is a reduction within the anti-cutback rule." *Id.* at 12a.

Judge Cudahy dissented. Pet. App. 24a-31a. He reasoned that a "reduction" of benefits does not occur from a "suspension" of benefit payments under the amended employment disqualification rules when, as here, the participant's post-retirement earned income replaces the plan benefit. *Id.* at 25a. He pointed out that "the suspension of pension payments does not reduce the recipient's current income because the temporarily lost pension income is replaced by earned income * * * from the very same construction industry." *Ibid.* Judge Cudahy concluded that the reasoning of the Fifth Circuit in *Spacek* was "quite compelling" and should not have been rejected by the panel in this case. *Id.* at 24a.

DISCUSSION

The court of appeals erred in concluding that a "suspension" of the payment of early retirement benefits that results from an amendment to the post-retirement "disqualifying employment" provision of the plan is a "reduction" of plan benefits for the employees who retired before adoption of the amendment and is therefore prohibited under the anti-cutback rule of Section 204(g) of ERISA, 29 U.S.C. 1054(g). The question presented in this case has substantial recurring importance in the routine administration of pension plans throughout the Nation. And, as the court below acknowledged (Pet. App. 3a), its decision in this case squarely conflicts with the decision of the Fifth Circuit in *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (1998).

Resolution of this conflict by this Court is warranted by the importance of the issue and by the need to ensure the uniform application of this broadly applicable

statute. Absent review by this Court, the conflict created by the decision in this case will result in disparate treatment of similarly situated pension plans and participants based solely upon the happenstance of their geographic location.

1. Section 204(g)(1) of ERISA generally provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan * * * ." 29 U.S.C. 1054(g)(1). Section 204(g)(2) then further provides that a plan amendment that has the effect of "eliminating or reducing an early retirement benefit" is to be treated as a decrease of an "accrued benefit" that is barred by Section 204(g)(1). 29 U.S.C. 1054(g)(2). The prohibitions imposed by those provisions are known as the "anti-cutback" rule.

In this case, the court of appeals held that a "suspension" of the payment of early retirement benefits that results from an amendment to a plan's "disqualifying employment" provision is a "reduction" of benefits prohibited under this anti-cutback rule. In reaching that conclusion, the court acknowledged (Pet. App. 3a-4a, 11a n.7) that its decision squarely conflicts with the decision of the Fifth Circuit in *Spacek* v. *Maritime Association*, *supra*, and with the reasoning and conclusion of the Sixth Circuit in *Whisman* v. *Robbins*, 55 F.3d 1140 (1995).[2]

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[2] In *Whisman*, as in *Spacek*, the court concluded that the anti-cutback rule does not apply to a plan amendment that expands restrictions on post-retirement employment, because such a "suspension" is not a "reduction or elimination" of accrued benefits within the meaning of that statute. 55 F.3d at 1147. As the Fifth Circuit noted in *Spacek*, 134 F.3d at 288 n.6., however, the *Whisman* court went on to conclude that the plaintiff would not have prevailed in that case even under the plan as it existed prior to its amendment. 55 F.3d. at 1148. For this reason, the court below described that alternative holding in *Whisman* as "dicta." Pet. App. 11a n.7.

The facts of *Spacek* are indistinguishable from those of the present case. In *Spacek*, a plan participant took early retirement and thereafter became reemployed in the same industry. At the time of his retirement, the provisions of the plan were such that his reemployment did not affect his ability to receive early retirement benefits. After his retirement, however, the plan was amended to suspend the payment of early retirement benefits to retirees who were reemployed in the same industry. When the participant became reemployed, the plan suspended payment of his early retirement benefits. 134 F.3d at 286-287. The Fifth Circuit concluded that no prohibited cutback of benefits occurred because the "suspension" of the payment of benefits attributable to a plan amendment that expands the definition of disqualifying post-retirement employment does not result in a prohibited "reduction" of benefits under ERISA even as applied to participants who had retired prior to the amendment. *Id.* at 287-292.

The court in *Spacek* correctly rested its conclusion on three principal grounds:

(i) First, as the Fifth Circuit noted (134 F.3d at 288-289), Congress has differentiated between a "reduction" of benefits and a "suspension" of benefit payments in several provisions of the statute. For example, Section 4281(a) of ERISA provides that, in certain situations involving terminated benefit plans, the plan sponsor "shall *amend the plan to reduce benefits*, and shall *suspend benefit payments*, as required by this section." 29 U.S.C. 1441(a) (emphasis added). Congress is thus well aware of the literal difference between an amendment to reduce benefits and a suspension of bene-

fit payments. Similar separate usages of these terms appear in other ERISA provisions. See 29 U.S.C. 1342(d)(1)(A)(v); 29 U.S.C. 1053(a)(3)(E)(ii); 29 U.S.C. 1301(a)(8); cf. 29 C.F.R. 2520.104b-4(a)(1)(iii), (2)(iv). As the Fifth Circuit observed in *Spacek*, if a "reduction" of benefits automatically encompasses every "suspension" of benefit payments, the separate usages of these two terms in ERISA would be redundant, which would be contrary to the settled rule of statutory construction that each word of a statute is "to have meaning." 134 F.3d at 289 (quoting *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)).

(ii) While the anti-cutback rule of Section 204(g) expressly prohibits a decrease of an accrued benefit, it does not purport to prohibit a suspension of benefit payments that is authorized under other provisions of the statute. In particular, the anti-cutback rule does not prohibit the suspension of the payment of retirement benefits authorized by Section 203(a) of ERISA, 29 U.S.C. 1053(a). That provision authorizes the inclusion in multiemployer plans (such as the plans involved in *Spacek* and in the present case) of provisions that suspend the payment of retirement benefits "for such period as the employee is employed, subsequent to the commencement of payment of such benefits * * * in the same industry, in the same trade or craft, and the same geographic area covered by the plan * * * ." 29 U.S.C. 1053(a)(3)(B). In enacting the anti-cutback rule, Congress did not intend to treat a temporary "suspension" of benefit payments under this type of "disqualifying employment" provision—a suspension that is entirely within the control of the retiree—as a prohibited "reduction" of accrued benefits under the plan itself. *Spacek*, 134 F.3d at 289-290.

Representative William Clay, who introduced the House bill that led to the enactment of paragraph (2) of the anti-cutback provision, made this point clear during the congressional debates (130 Cong. Rec. 23,487 (1984) (emphasis added)):

> I wish to further clarify *the anti cutback provisions* of Section 301 of the bill. Those provisions *are not intended to apply to benefit changes authorized by existing law. * * * Nor do those provisions in any way apply to or affect the provisions of ERISA section 203(a)(3)(B)* [, 29 U.S.C. 1053(a)(3)(B),] and code section 411(a)(3)(B) *relating to the suspension of benefits for postretirement employment, including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.*

As the court emphasized in *Spacek*, Representative Clay's statement indicates that Section 203(a)(3)(B) of ERISA "authorizes the very type of [plan] amendment at issue in this case [for employees who retire under a qualified plan], and * * * [the anti-cutback rule] in no way limits this authorization." 134 F.3d at 290.

The anti-cutback rule in Section 204(g)(2) was enacted for the purpose of affording early retirement benefits "the same form of protection from reduction by amendment afforded to accrued benefits." *Spacek*, 134 F.3d at 291 (citing, *e.g.*, H.R. Rep. No. 655, 98th Cong., 2d Sess. 25-26 (1984)). Since "an amendment such as the one at issue here would not violate [the anti-cutback rule] if it were applied to suspend fully accrued benefits, it plainly cannot violate [the anti-cutback rule] if it is applied to early retirement benefits, which may or may not be fully accrued." 134 F.d at 291.

(iii) The Fifth Circuit also correctly noted in *Spacek* that the regulations that have been adopted to implement this complex statute support the conclusion that the plan amendments involved in this case and *Spacek* do not violate the anti-cutback rule. When an employee's pension benefit commences before normal retirement age, Section 204(c)(3) of ERISA specifies that the "accrued" portion of the early-retirement benefit is the "actuarial equivalent" of the retirement benefit available at normal retirement age. 29 U.S.C. 1054(c)(3); see 26 U.S.C. 411(c)(3). The regulations adopted to implement that provision specify that, in computing the actuarial equivalent of the retirement benefit available at normal retirement age for the purposes of this provision, "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] section 203(a)(3)(B)." 26 C.F.R. 1.411(c)-1(f). The Fifth Circuit correctly concluded in *Spacek* that, "because the reduction in total benefits paid over the lifetime of the plan participant as a result of the suspension need not be accounted for actuarially in computing the participant's accrued benefit under [29 U.S.C.] § 1054(c)(3)," an amendment authorizing such a suspension "does not serve to decrease the participant's accrued benefits, and thus cannot violate [the anti-cutback provision of] § 1054(g)." 134 F.3d at 291.

2. In the present case, the court of appeals erred in rejecting each of the three rationales of the *Spacek* court. The court reasoned that the suspension of benefit payments under the plan amendment violates the anti-cutback rule because the retired employees permanently lost a supposed "right" to work as construction supervisors while receiving monthly pension benefits. Pet. App. 9a-10a. In reaching that conclusion, the court

disagreed with *Spacek*'s plain language analysis, found unpersuasive the *Spacek* court's reliance on the legislative history of the statute, and rejected the *Spacek* court's reliance on the relevant regulations. *Id.* at 11a-21a.

a. The court reasoned that an amendment that expands the "disqualifying employment" provisions of a plan causes a "reduction" of benefits prohibited by the anti-cutback rule because even a temporary suspension of benefit payments permanently eliminates the benefit for the months that the suspension is in effect. The court stated that a "disqualifying employment" suspension reduces the total benefits that the participants receive during their lifetime because "the retiree never recovers the payments lost during the employment period." Pet. App. 10a.

In reaching this conclusion, however, the court ignored the fact that respondents lacked a statutorily protected right to receive such payments while working, for the plan retained the right to amend its "disqualifying employment" provision in the manner authorized by Section 203(a)(3)(B) of ERISA, 29 U.S.C. 1053(a)(3)(B). Since that provision authorizes the employer to adopt a "disqualifying employment" provision under which "the payment of benefits is suspended" when specified post-retirement employment occurs (29 U.S.C. 1053(a)(3)(B)) the adoption of such a provision is not a "reduction" of "accrued" benefits. See *Spacek* 134 F.3d at 291; pages 7-9, *supra*.

Moreover, as Judge Cudahy explained in his dissenting opinion in this case, a suspension of pension payments under a "disqualifying employment" provision does not inherently reduce the income received by respondents, since the temporary suspension of their pension income is replaced by earned income derived

from employment in the same industry. Pet. App. 25a. As Judge Cudahy observed, in light of the fact that employees in this industry can take early retirement (as respondents did) when they are still in their thirties, "one might logically expect employment restrictions on early retirees to be more onerous than those on normal retirees." *Id.* at 28a-29a. Without such restrictions, the financial integrity of the plan may be affected by paying benefits to participants "who have not really retired." *Id.* at 31a.

In enacting Section 203(a)(3)(B) of ERISA, Congress authorized the suspension of benefit payments for the very purpose of preventing "double-dipping" through post-retirement employment in the same industry. Such "double-dipping" obviously disadvantages the employees who must continue to fund the benefits of early retirees, while competing with them for the same wages.

b. The court also erred in this case in finding the legislative history of the anti-cutback rule to be unpersuasive. The court stated that the floor statement of Representative William Clay was ambiguous and that there was no other support in the legislative history for Representative Clay's understanding of the statute. Pet App. 16a. As the dissent correctly observed, however, the "effort of the majority to explain away this comment is unconvincing." *Id.* at 26a.

The history of the statute clearly reveals that the fundamental purpose for the addition of paragraph (2) to the anti-cutback rule was to afford early retirement benefits the same form of protection from reduction by amendment that is afforded to normal accrued benefits. S. Rep. No. 575, 98th Cong., 2d Sess. 27-28 (1984). As the *Spacek* court observed, since the amendment of a post-retirement "disqualifying employment" provision

under Section 203(a)(3)(B) does not abridge the "accrued benefits" of plan participants upon normal retirement, "then it also cannot violate [the anti-cutback rule when] applied to early retirement benefits." 134 F.3d at 291.

c. The court of appeals also erred in this case in concluding that the Treasury regulations that interpret the Internal Revenue Code counterpart of the anti-cutback rule (26 U.S.C. 411(d)(6)) support its conclusion in this case. Pet. App. 21a. That regulation broadly specifies that a plan may not be amended to add new conditions that restrict the availability of a "protected benefit that has already accrued." 26 C.F.R. 1.411(d)-4 Q&A-7. By its plain terms, however, that regulation has no relevance to plan amendments that affect a benefit that is *not* "protected" under ERISA. Since an employee does not have a right to be free from an employment disqualification provision that (as in this case) conforms to Section 203(a)(3)(B) of ERISA, this regulation is simply inapplicable to this case.

The agency's further guidance makes this clear. The Internal Revenue Manual expressly states that an amendment that reduces retirement benefits "on account of [Section] 203(a)(3)(B) service does not violate [the anti-cutback rule]." Int. Rev. Manual 4.72.14.3.5.3(7) (quoted at Pet. App. 22a n.17).[3] The majority was mistaken in suggesting (Pet. App. 22a n.17) that this statement in the Manual does not represent a long-standing agency interpretation. The Internal Revenue Service reports that it has consistently approved plan amendments that have provided

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[3] As the dissent noted in this case, this provision of the Manual "fits neatly into the interpretation derived from plain meaning" and "is, therefore, hard to explain away." Pet. App. 26a.

for the suspension of post-retirement benefits under employment disqualification provisions that conform to Section 203(a)(3)(B) of ERISA.

3. Respondents err in claiming that the conflict among the circuits is not yet well established because the panel in *Spacek* did not "follow earlier Fifth Circuit precedent on the status of early-retirement benefits." Br. in Opp. 10. The earlier Fifth Circuit decision cited by respondents is *Harms* v. *Cavenham Forest Industries, Inc.*, 984 F.2d 686, 691-692 (1993). In that case, the court held that certain early retirement benefits for plan participants who were involuntarily separated from employment constituted accrued benefits for purposes of the anti-cutback rule.

The unanimous panel in *Spacek* concluded that its opinion in that case was *not* in tension with that court's earlier decision in *Harms*. While acknowledging that the *Harms* panel had concluded that the retirement benefits at issue in that case were "accrued," the *Spacek* panel explained that the question whether the suspension of such benefits under an employment disqualification provision that conformed to Section 203(a)(3)(B) of ERISA would be regarded as "reducing" any accrued benefits was simply not before the court in *Harms*. 134 F.3d at 291 n.9. As the *Spacek* panel concluded, because a plan amendment of a "disqualifying employment" provision that complies with Section 203(a)(3)(B) would not reduce "accrued benefits" for normal retirement purposes, "it plainly cannot violate" the anti-cutback rule as "applied to early retirement benefits * * * ." *Id.* at 291. The Sixth Circuit reached that same conclusion in *Whisman* v. *Robbins*, *supra*. See note 2, *supra*.

This direct conflict that exists among the circuits warrants resolution by this Court. Respondents are

incorrect in suggesting (Br. in Opp. 12) that this Court should delay addressing the issue in this case until other courts have considered the matter in a variety of factual situations. The question of law presented in this case does not vary based on the underlying facts. Moreover, three circuits have already ruled on the question presented in this case, and the court below has declined to rehear the issue en banc. See notes 1 & 2, *supra*. The present case is therefore an appropriate vehicle for resolving the square conflict among the circuits on this issue.[4]

4. The question addressed in this case has substantial recurring importance. As the National Coordinating Committee for Multiemployer Plans notes (NCCMP Amicus Br. 2-3, 9-12), multiemployer plans provide coverage for millions of workers throughout the Nation, and suspension-of-benefit provisions are frequently used by these plans to manage plan expenses and workforce levels. The decision of the court of appeals in this case would restrict the historic ability of multiemployer pension plans to tailor permitted

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[4] Respondents point out (Br. in Opp. 12) that neither the Fifth Circuit nor the Seventh Circuit had occasion to address the amendment to the anti-cutback rule enacted by Congress in 2001. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 645(b)(2), 115 Stat. 38. This amendment authorizes the Treasury to issue regulations that would permit plan amendments to eliminate or reduce early retirement benefits that create significant burdens and complexities for a plan if the amendments do not adversely affect the rights of any participant "in a more than a de minimis manner." H.R. Conf. Rep. No. 84, 107th Cong., 1st Sess. 254-256 (2001). That amendment has no bearing on the separate and prior question whether a plan amendment that expands a permitted suspension of the payment of benefits under Section 203(a)(3)(B) of ERISA *is* a "reduction" of "accrued" benefits for purposes of the anti-cutback rule.

suspension-of-benefit provisions to current employment conditions.

The conflict created by the decision in this case would also preclude a uniform national administration of pension plan rules. One of the principal goals of ERISA is "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987). Uniformity is obviously impossible when, as in this instance, pension plans are made subject to varying legal obligations in different parts of the country. *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001). Because multiemployer plans often operate in more than one federal circuit, individual plans may become subject to inconsistent obligations under the decision in this case.

Review by this Court of the conflict created by the decision in this case is thus warranted both by the importance of the issue and by the need to ensure uniformity in the administration of this national legislation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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Opinion of the United States District Court for the Central District of Illinois 33a

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

No. 99-CV-1388

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Plaintiffs,

v.

CENTRAL LABORERS' PENSION FUND,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
12/10/99	2	COMPLAINT filed; case referred to Robert J. Kauffman, U.S. Magistrate Judge. (ml) [Entry date 12/14/99] [Edit date 12/14/99]
2/7/00	4	MOTION by defendant Central Laborers' PF for summary judgment (sh) [Entry date 02/09/00]
2/7/00	6	MEMORANDUM IN SUPPORT of motion for summary judgment [4-1] by defendant Central Laborers' PF (sh) [Entry date 02/09/00]
2/7/00	7	STATEMENT OF FACTS (Undisputed) by defendant Central Laborers' PF in support of motion for summary judgment [4-1] (sh) [Entry date 02/09/00]
2/7/00	8	APPENDIX filed by defendant Central Laborers' PF re motion for summary judgment [4-1] (sh) [Entry date 02/09/00]

DATE	NO.	PROCEEDINGS
2/14/00	9	MEMORANDUM IN SUPPORT of motion for summary judgment [4-1] by plaintiff Thomas E. Heinz (sh) [Entry date 02/15/00]
2/14/00	10	MOTION by plaintiff Thomas E. Heinz for order for additional discovery under Rule 56(f) (Affidavits Unavailable) (sh) [Entry date 02/15/00]
2/25/00	11	ANSWER by defendant Central Laborers' PF (hw) [Entry date 02/29/00]
2/25/00	12	RESPONSE by defendant Central Laborers' PF to motion for order for additional discovery under Rule 56(f) (Affidavits Unavailable) [10-1] (hw) [Entry date 02/29/00]
4/6/00		MINUTE-ENTRY: by Chief Judge Joe B. McDade. Parties present in open court by Attys. Gasick/Wilday/O'Hara for Rule 16 conference on 4/6/00. Argument re: motion for rule 56(f) discovery. Motion passed to be revisited if and when Court proceeds on Summary Judgment motion. Summary Judgment motion held in abeyance. Court consider*[s] [it]* appropriate for parties to file motion*[s]* for judgment on the pleadings instead of summary judgment. Parties to file motion*[s]* for judgment on the pleadings by Mtn filing ddl of 5/8/00; responses due within 14 days thereafter (misc ddl for responses set 5/22/00). (cc: all counsel) (sh) [Entry date 04/10/00]

DATE	NO.	PROCEEDINGS
5/8/00	13	MOTION by plaintiff Thomas E. Heinz, plaintiff Richard J. Schmitt Jr. for judgment on the pleadings (kb) [Entry date 05/08/00]
5/8/00	14	MEMORANDUM IN SUPPORT of motion for judgment on the pleadings [13-1] by plaintiff Thomas E. Heinz, plaintiff Richard J. Schmitt Jr. (kb) [Entry date 05/08/00]
5/8/00	15	MOTION by defendant Central Laborers' PF for judgment on the pleadings (hw) [Entry date 05/09/00]
5/8/00	16	MEMORANDUM IN SUPPORT of motion for judgment on the pleadings [15-1] by defendant Central Laborers' PF (hw) [Entry date 05/09/00]
5/22/00	17	RESPONSE by plaintiffs Thomas E. Heinz and Richard J. Schmitt Jr. to *[motion for judgment on the pleadings][[15-1]]* (ww) [Entry date 05/22/00]
5/22/00	18	RESPONSE by defendant Central Laborers' PF to motion for judgment on the pleadings [13-1] (rk) [Entry date 05/24/00]
8/9/00	19	ORDER by Chief Judge Joe B. McDade – Plaintiff's motion for judgment on the pleadings (motion for summary judgment) [13-1] is DENIED. Defendant's motion for judgment on the pleadings [15-1] is ALLOWED. Defendant's motion for summary judgment [4-1] is mooted by this Order. Case terminated. (cc: all counsel) (sh) [Entry date 08/09/00]

DATE	NO.	PROCEEDINGS
8/9/00	20	JUDGMENT in a civil case entered (cc: all counsel) (sh) [Entry date 08/09/00]
9/5/00	21	NOTICE OF APPEAL by plaintiff from Dist. Court decision [20-1] (cc: all counsel) (sh) [Entry date 09/5/00]
9/5/00	22	JURISDICTIONAL DOCKETING STATEMENT filed by plaintiff (sh) [Entry date 09/05/00]
9/5/00	25	Received appeal fee in amount of $105.00 (Receipt #39634) (rk) [Entry date 09/07/00]
10/16/02	33	MANDATE from USCA reversing and remanding the Decision of the District Court [Appeal [21-1] (cad) [Entry date 10/16/02]
10/18/02	34	MOTION by plaintiffs Thomas E. Heinz and Richard J. Schmitt Jr. for judgment on the pleadings and damages following the 9/13/02 judgment by the US Court of Appeals for the 7th Circuit (ww) [Entry date 10/21/02]
11/1/02	36	MOTION by defendant to strike plaintiff's motion for judgment on the pleadings and damages (sh) [Entry date 11/04/02]
11/1/02	37	MEMORANDUM IN SUPPORT of motion to strike plaintiff's motion for judgment on the pleadings and damages [36-1] by defendant (sh) [Entry date 11/04/02]
11/5/02	38	MEMORANDUM IN SUPPORT of motion for judgment on the pleadings and damages following the 9/13/02 judgment by the US Court of Appeals for the 7th Circuit [34-1] and Reply to Defendant's Motion to Strike by plaintiffs (sh) [Entry date 11/05/02]

DATE	NO.	PROCEEDINGS
11/5/02	38	Memorandum of Law in Support of Plaintiffs' Motion for Judgment on the Pleadings and Damages Following the 9/13/02 Judgment by the U.S. Court of Appeals for the Seventh Circuit and Reply to motion to strike plaintiff's motion for judgment on the pleadings and damages [36-1] (sh) [Entry date 11/05/02]
11/15/02	40	SUPPLEMENT by plaintiffs Thomas E. Heinz, Richard J. Schmitt Jr. to Motion for Judgment on the Pleadings [34-1] (cad) [Entry date 11/15/02]
1/14/03	42	ORDER by Chief Judge Joe B. McDade granting motion for judgment on the pleadings and damages following the 9/13/02 judgment by the US Court of Appeals for the 7th Circuit [34-1]. Judgment is to be entered in favor of Plaintiffs. Regarding the issue of damages, it does not appear as if there is sufficient evidence in the record for the Court to assess damages accurately. Accordingly, the Court will convene a hearing to discuss the issue of damages on Fri., 1/31/03 at 1:30 PM (via phone – court to call). Further ordered that motion to strike plaintiff's motion for judgment on the pleadings and damages [36-1] is DENIED. (cc: all counsel) (sh) [Entry date 01/14/03]
4/18/03	46	MOTION by plaintiffs for judgment regarding the issue of damages (sh) [Entry date 04/21/03]

DATE	NO.	PROCEEDINGS
5/2/03	47	RESPONSE by defendant to motion for judgment regarding the issue of damages [46-1] and Defendant's Request for Deferral or Stay (sh) [Entry date 05/02/03]
5/2/03	48	MEMORANDUM IN SUPPORT of Defendant's response to Plaintiffs' Motion for Judgment Regarding the Issue of Damages and Defendant's Request for Deferral or Stay [47-1] (sh) [Entry date 05/02/03]
5/5/03	49	RESPONSE by plaintiff to Defendant's "Request" or Motion "for Deferral or Stay" [47-1] (sh) [Entry date 05/05/03]
5/16/03	50	Supplemental RESPONSE by defendant Central Laborers' PF to motion for judgment regarding the issue of damages [46-1] (rk) [Entry date 05/16/03]
5/16/03	52	NOTICE from CA7 that mandate is recalled and is stayed pending writ of certiorari (hw) [Entry date 05/27/03]
5/19/03	51	ORDER from Supreme Court—Ordered that the mandate of the US Court of Appeals for the Seventh Circuit, Case No. 00-3314, issued 10/15/02, is hereby recalled and stayed pending the disposition by this Court of the petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall terminate upon the sending down of the judgment of this Court. (FAX DOCUMENT) (sh) [Entry date 05/20/03]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-3314

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Appellants,

v.

CENTRAL LABORERS' PENSION FUND,
Appellee.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
9/8/00	Private civil case docketed. [00-3314] [1323915-1] Transcript information sheet due 9/18/00. Fee or IFP forms due on 9/22/00 for Thomas E. Heinz, for Richard J. Schmitt. (joce)
11/1/00	Filed 15c appellant's brief by Thomas E. Heinz, Richard J. Schmitt. Disk filed. [00-3314] [1340520-1] (joce)
12/1/00	Filed 15c appellee's brief by Central Laborers Pen. Disk filed. [00-3314] [1350496-1] (joce)
12/18/00	Filed 15c appellant's reply brief by Thomas E. Heinz, Richard J. Schmitt. Disk filed. [00-3314] [1355767-1] (squi)
2/12/01	Case heard and taken under advisement by panel: Circuit Judge Richard D. Cudahy, Circuit Judge Ilana D. Rovner, Circuit Judge Ann C. Williams. [00-3314] [1371540-1] (broo)

DATE	PROCEEDINGS
9/13/02	Filed opinion of the court by Judge Williams. REVERSED and REMANDED. Because this opinion conflicts with the Fifth Circuit's decision in Spacek, it has been circulated pursuant to Circuit Rule 40(e) to all members of the court in regular active service. A majority did not wish to hear the case en banc. Judge Evans voted to grant rehearing en banc. Circuit Judge Richard D. Cudahy, dissenting, Circuit Judge Ilana D. Rovner, Circuit Judge Ann C. Williams. [00-3314] [1323915-1] (tiff)
9/13/02	ORDER: Final judgment filed per opinion. With costs: y. [00-3314] [1546794-1] (tiff)
9/27/02	Filed motion by Appellee Central Laborers Pen. to stay the mandate. [1551569-1] [00-3314] (hudk)
10/10/02	Filed Appellant Richard J. Schmitt, Appellant Thomas E. Heinz response to Appellee Central Laborers Pen. motion to stay the mandate. [1555846-1] [1555846-1] [00-3314] (hudk)
10/11/02	ORDER issued DENYING motion to stay the mandate. [1551569-1] RMV [00-3314] (squi)
10/15/02	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 1 vol. pleadings). [NOTE: Mandate recalled by U.S. Supreme Court on 5/16/03.] [00-3314] [1443097-1] (cove)
12/17/02	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 02-891. [00-3314] [1576929-1] (land)

DATE	PROCEEDINGS
5/16/03	Filed order from the Supreme Court that the mandate issued on 10/15/02 is recalled and stayed pending the disposition of the Petition for Writ of Certiorari. Dist. [00-3314] [1323915-1] (jame)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

CAPTION OMITTED

COMPLAINT

Thomas E. Heinz and Richard J. Schmitt Jr., by their attorney, GERY R. GASICK, complain as follows:

INTRODUCTION

1. Plaintiffs allege that the Central Laborers' Pension Fund ("Fund") violated Section 204(g) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1054(g), by suspending their monthly retirement benefits of $1,676.50 and $1,652.32, respectively, by means of a 1998 Amendment to the Pension Plan ("Plan") which redefined "disqualifying employment" rules, approximately 2 years after Plaintiffs retired.

Alternatively, Plaintiffs seek to declare a construction of the 1998 Amendment that would determine that the suspension of monthly retirement benefits violated the 1998 Amendment itself. Section 502 of ERISA, 29 U.S.C. § 1132(a)(3), allows a participant "to enjoin any act or practice which violates... the terms of the plan. . . ."

PARTIES

2. The Plaintiffs, residents of Peoria County, Illinois, are "participants" in the Plan. They retired approximately December 1, 1996 pursuant to a "30 credit pension" prior to

attaining age 60. Shortly thereafter they commenced work as supervisors (non-union management) in the construction industry while receiving their pension benefits and continued to so work after the "disqualifying employment" rules were amended by the 1998 Amendment.

3. Plaintiffs' monthly retirement benefits were suspended within months of the 1998 Amendment of Section 6.7 of the Plan, redefining "disqualifying employment."

4. According to its Summary Plan Description, the Fund is a trust fund established to provide retirement benefits to employees working under the jurisdiction of the local unions which participate in the Central Laborers' Pension Fund. The Agreement and Declaration of Trust, originally dated January 1, 1965, and since amended, establishes the Fund. The Trust Agreement and the Pension Plan govern the operation of the Fund. A Board of Trustees acts on behalf of the employees in managing the Fund's operations and is made up of an equal number of union and employer representatives.

5. The Fund is headquartered in Jacksonville, Illinois. The "participating local union" No.165 is the Peoria, Illinois local where Plaintiffs' membership is based and the only local where Plaintiffs had membership throughout their 20 plus years as construction workers. Approximately 66 local unions, located throughout Illinois, participate in the Fund.

JURISDICTION

6. The Court has federal question jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132 in that Plaintiffs allege a violation of ERISA, 29 U.S.C. §§ 1001-1461.

VENUE

7. Venue is proper under 28 U.S.C. § 1391(b)(2) and 29 U.S.C. § 1132(e) in that a substantial part of the events or omissions giving rise to the claim occurred in Peoria County

Illinois and/or the "breach took place" in Peoria County Illinois (29 U.S.C. §1132(e)(2)).

BACKGROUND

8. Section 6.3 of the Plan provides, in pertinent part:

Section 6.3. Action of Trustees.

The Trustees shall, subject to the requirements of the law, be the sole judges of the standard of proof required in any case and the application and interpretation of this Plan, and decisions of the Trustees shall be final and binding on all parties.

Wherever in the Plan the Trustees are given discretionary powers, the Trustees shall exercise such powers in a uniform nondiscriminatory manner.

All questions or controversies of whatsoever character arising in any manner or between any parties or persons in connection with this Plan or its operation, whether as to any claim for benefits, as to the construction of the language of this Plan or any rules and regulations adopted by the Trustees, or as to any writing, decision, instrument or account in connection with the operation of the Plan or otherwise, shall be submitted to the Board of Trustees for decision. In the event a claim for benefits has been denied, no lawsuit or other action against the Fund or its Trustees may be filed until the matter has been submitted for review under the ERISA-mandated review procedure set forth in Section 6.4. The decision on review shall be binding upon all persons dealing with the Plan or claiming any benefit hereunder, except to the extent that such decision may be determined to be arbitrary or capricious by a court or arbitrator having jurisdiction over such matter. (Emphasis added).

9. Plaintiffs exhausted their appeal rights under §6.4 of the Plan as the Fund Office informed Plaintiffs that the Plan Trustees "denied" their appeal.

10. Section 8.1 of the Plan provides:

Section 8.1. Amendments.

This Plan may be amended at any time by the Trustees, consistent with the provisions of the Trust Agreement. However, no amendment may decrease the accrued benefit of any Participant, except:

(a) As necessary to establish or maintain the qualification of the Plan or the Trust Fund under the Internal Revenue Code and to maintain compliance of the Plan with the requirements of ERISA, or

(b) If the amendment meets the requirements of Section 302(c)(8) of ERISA [29 U.S.C. §1082] and Section 412(c)(8) of the Internal Revenue Code, and the Secretary of Labor has been notified of such amendments and has either approved of it or, within 90 days after the date on which such notice was filed, he failed to disapprove.

11. At the time Plaintiffs retired in December of 1996 "Amendment No. 4 to the Pension Plan of the Central Laborers' Pension Fund" effective October 1, 1996 ("1996 Amendment") provided in pertinent part:

Section 6.7. Suspension of Benefits:

(a) Suspension of Benefits Before Age 60.

The monthly benefit shall be suspended for any month in which the Participant worked or was paid for at least 40 hours in Disqualifying Employment, as defined in Section 6.7(b).

(b) Disqualifying Employment Before Age 60.

1. "Disqualifying Employment" for the period before age 60, is employment with an Employer in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker).

(The complete 1996 Amendment of Section 6.7 is attached as Exhibit A).

12. Plaintiffs retired following the 1996 Amendment referenced above in Paragraph 11 and thereafter commenced receiving monthly benefits under the Plan of $1,676.50 (Heinz) and $1,652.32 (Schmitt), all while working in a non-union supervisory/management position in the construction industry which was not "disqualifying employment" under the 1996 Amendment to Section 6.7 (b)(1) of the Plan.

13. Approximately 2 years after Plaintiffs' retirement, "Amendment No. 7 to the Pension Plan of the Central Laborers' Pension Fund," effective October 1, 1998, ("1998 Amendment") provided in pertinent part:

Section 6.7 - Suspension of Benefits:

(a) An Employee shall have his pension suspended for any period of Disqualifying Employment as defined below.

(b) Employees who initially retired prior to October 1, 1998, Disqualifying Employment shall be defined as follows:

(1) Initially retired prior to the Participant's 53rd birthday: Disqualifying Employment with an Employer in any capacity in the construction

industry (either as a union or non-union construction worker).

(The complete 1998 Amendment of Section 6.7 is attached at Exhibit B).

14. Within months of the 1998 Amendment, noted above in Paragraph13, Plaintiffs' monthly retirement benefits were suspended by the Fund and that suspension continues to date.

FIRST CAUSE OF ACTION

VIOLATION OF § 204(g) of ERISA

(29 U.S.C. §1054(g))

15. Section 204(g)(1) of ERISA provides that accrued benefits cannot be reduced or eliminated by plan amendment. Section 204(g)(2) of ERISA provides that a plan amendment that eliminates or reduces early retirement benefits or retirement-type subsidies, shall be treated as reducing accrued benefits.

16. The monthly retirement benefits received by Plaintiffs prior to the 1998 Amendment are accrued benefits.

17. Plaintiffs have always satisfied the 1996 Amendment eligibility requirements of Section 6.7 by not engaging in "disqualifying employment" as defined in the 1996 Amendment.

18. The Fund has suspended Plaintiffs' monthly retirement benefits from approximately February 1, 1999 to date.

WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor and against defendant, Central Laborers' Pension Fund and request the following relief:

(a) that the Court declare the Fund's suspension of Plaintiffs' monthly retirement benefits, via the 1998 Amendment, arbitrary and capricious and a violation of § 204(g) of ERISA;

(b) that the Plaintiffs receive monthly retirement benefits from the date of suspension by the Fund to date and in the future while Plaintiffs satisfy the terms and conditions of the Plan as they existed prior to the 1998 Amendment;

(c) that previously suspended monthly retirement benefits be paid Plaintiffs with pre-judgment interest from February 1, 1999 and any post judgment interest.

(d) that Plaintiffs be awarded attorney's fees and costs under 29 U.S.C.§1132(g) upon a finding that the Fund acted in bad faith in suspending Plaintiffs' monthly retirement benefits, or that said suspension or the defense to these proceedings, was not substantially justified;

(e) that Plaintiffs be awarded such further relief as this Court deems just and proper.

SECOND CAUSE OF ACTION

(DECLARATORY RELIEF)

19. Alternatively, Plaintiffs seek declaratory relief pursuant to 28 U.S.C. § 2201 for the purpose of determining a question of actual controversy among the parties involving the actual construction and scope of the 1998 Amendment of Section 6.7 of the Plan pursuant to 29 U.S.C. § 1132(a)(3).

20. Approximately 2 years after Plaintiffs' retirement, "Amendment No. 7 to the Pension Plan of the Central Laborers' Pension Fund," effective October 1, 1998, ("1998 Amendment") provided in pertinent part:

Section 6.7 - Suspension of Benefits:

(a) An Employee shall have his pension suspended for any period of Disqualifying Employment as defined below.

(b) For Employees who initially retired prior to October 1, 1998, Disqualifying Employment shall be defined as follows:

(1) Initially retired prior to the Participant's 53rd birthday: Disqualifying Employment with an Employer in any capacity in the construction industry (either as a union or non-union construction worker).

(The complete 1998 Amendment of Section 6.7 is attached at Exhibit B).

21. Within months of the1998 Amendment noted above in paragraph 20, Plaintiffs' monthly retirement benefits were suspended by the Fund and that suspension continues to date.

22. The pertinent part of the 1998 Amendment referenced above in paragraph 20 can and should be construed, focusing equally on the language in parentheses, to have application against Plaintiffs only if they were in fact performing the work of a "construction worker" and not when performing the work of supervisors, in management, which has never been within the scope of a collective bargaining agreement and not within the usual and customary definition of "construction worker."

23. The parenthetical language, "either as a union or non union construction worker" is designed to suspend Plaintiffs' retirement benefits if they tried to work, as a construction worker, at a non-union job site. Furthermore, rules of gramatical construction dictate that the words "union or non-union" are adjectives of "construction worker." A management position is the antithesis of "construction worker." The focus of the application of the 1996 and 1998 Amendments at Section 6.7(b)(1) is that the employee must be a "construction worker," first and foremost.

See for comparison the complete, age and date indexed, provisions of Section 6.7 of the 1998 Amendment attached at Exhibit B and the 1996 Amendment at Exhibit A.

WHEREFORE, Plaintiffs pray, in the alternative, that this Court enter judgment in their favor and against Defendant, Central Laborers' Pension Fund and request the following relief:

(a) declare that Plaintiffs post-retirement employment as supervisors in management positions in the construction industry does not violate the 1998 Amendment of Section 6.7 of the Plan and that the Fund's suspension of Plaintiffs' retirement benefits was arbitrary and capricious;

(b) that the Plaintiffs receive monthly retirement benefits from the date of suspension by the Fund to date and in the future while Plaintiffs satisfy the terms and conditions of the Plan as provided in the 1998 Amendment;

(c) that previously suspended monthly retirement benefits be paid Plaintiffs with pre-judgment interest from February 1, 1999 and any post judgment interest.

(d) that Plaintiffs be awarded attorney's fees and costs under 29 U.S.C.§ 1132(g) upon a finding that the Fund acted in bad faith in suspending Plaintiffs' monthly retirement benefits, or that said suspension or the defense to these proceedings, was not substantially justified;

(e) that Plaintiffs be awarded such further relief as this Court deems just and proper.

THOMAS E. HEINZ and
RICHARD J. SCHMITT JR.,
Plaintiffs

BY: /s/ Gery R. Gasick
GERY R. GASICK, Their Attorney

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

CAPTION OMITTED

ANSWER

NOW COMES Defendant CENTRAL LABORERS' PENSION FUND, ("Fund"), by its attorneys, Cavanagh & O'Hara and Brown, Hay & Stephens, and for its Answer to the Complaint filed herein states as follows:

1. Paragraph 1 of Plaintiffs' Complaint does not allege facts, and contains only conclusions of law; Defendant contests the legal conclusions contained therein;

2. Defendant admits the factual allegations of Paragraph 2 of Plaintiffs' Complaint;

3. Defendant admits the factual allegations of Paragraph 3 of Plaintiffs' Complaint;

4. Defendant admits the factual allegations of Paragraph 4 of Plaintiffs' Complaint;

5. Defendant admits the factual allegations of Paragraph 5 of Plaintiff's Complaint;

6. Paragraph 6 of Plaintiffs' Complaint does not contain factual allegations, but only averments of law; Defendant admits said averments of law;

7. Defendant admits that venue is proper as alleged in Paragraph 7 of Plaintiffs' Complaint; Defendant contests the legal conclusions contained therein;

8. Defendant admits the factual allegations of Paragraph 8 of Plaintiffs' Complaint;

9. Defendant admits the factual allegations of Paragraph 9 of Plaintiffs' Complaint;

10. Defendant admits the factual allegations of Paragraph 10 of Plaintiffs' Complaint;

11. Defendant admits the factual allegations of Paragraph 11 of Plaintiffs' Complaint;

12. Defendant admits the factual allegations of Paragraph 12 of Plaintiffs' Complaint;

13. Defendant admits the factual allegations of Paragraph 13 of Plaintiffs' Complaint;

14. Defendant admits the factual allegations of Paragraph 14 of Plaintiffs' Complaint;

15. To the limited extent that Paragraph 15 of Plaintiffs' Complaint summarizes Section 204(g) of ERISA, Defendant admits the same. Defendant affirmatively states in answer to Paragraph 15 of Plaintiffs' Complaint that Section 204(g) of ERISA speaks for itself;

16. Defendant admits the factual allegations of Paragraph 16 of Plaintiffs' Complaint;

17. Defendant admits the factual allegations of Paragraph 17 of Plaintiffs' Complaint;

18. Defendant admits the factual allegations of Paragraph 18 of Plaintiffs' Complaint;

19. Paragraph 19 of Plaintiffs' Complaint does not allege facts, and contains only conclusions of law; Defendant contests the legal conclusions contained therein;

20. Defendant admits the factual allegations of Paragraph 20 of Plaintiffs' Complaint;

21. Defendant admits the factual allegations of Paragraph 21 of Plaintiffs' Complaint;

22. Paragraph 22 of Plaintiffs' Complaint does not allege facts, and contains only conclusions of law; Defendant contests the legal conclusions and arguments of law contained therein;

23. Paragraph 23 of Plaintiffs' Complaint does not allege facts, and contains only conclusions of law; Defendant contests the legal conclusions and arguments of law contained therein;

WHEREFORE, Defendant, CENTRAL LABORERS' PENSION FUND, prays that Plaintiffs' Complaint be denied and dismissed and costs assessed against them.

CENTRAL LABORERS'
PENSION FUND,
Defendant

By: /s/ Patrick J. O'Hara
One of Its Attorneys

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EXCERPTS FROM CENTRAL LABORERS' PENSION FUND, SUMMARY PLAN DESCRIPTION, REVISED AND EFFECTIVE JULY 1, 1995

IMPORTANT TO REMEMBER

* Save this booklet.

* Tell your family, particularly your spouse, about this booklet and where you keep it filed.

* If you lose your copy, you can ask the Fund Office for another.

* If you have worked in employment covered by the Plan and earned five or more credits and you are leaving without definite plans to return, you may be entitled to a pension, payable when you have reached retirement age. To protect your benefit rights, call or write the Fund Office. Arrangements will be made to furnish you with a statement of your benefit rights. In that case, the Fund will also file notice with the government so that the Social Security Administration can remind you at a future time of your vested pension rights.

* Notify the Fund Office promptly if you change your address. If the Trustees are unable to reach you at your last address on record, any benefit payments will be held without interest.

* Nothing in the general description is meant to interpret or change in any way the provisions expressed in the Plan. Only the full Board of Trustees is authorized to interpret the Pension Plan described in this booklet. No employer or union nor any representative of any employer or union, in such capacity, is authorized to interpret this Plan nor can any such person act as agent of the Trustees. The Trustees reserve the right to amend, modify or discontinue all or part of this Plan whenever, in their judgment, conditions so warrant.

* Refer to page 139 of this booklet for an explanation of the February 1, 1996 revision to the Lump Sum Payment Option.

* * *

HIGHLIGHTS OF THE PENSION PLAN

1. The Pension Fund is a trust fund set up to provide Retirement benefits to employees working under the jurisdiction of the local unions which participate in the Central Laborers' Pension Fund.

2. At the start, the Central Laborers' Pension Fund covered Laborers within the jurisdiction of Local Union #253, affiliated with the Laborers' International Union of North America, AFL-CIO. Since January 1, 1965, other Locals have collectively bargained for employer contributions to the Pension Fund and their members are now covered under the Pension Plan.

3. There is no compulsory Retirement date under this Plan.

4. The Pension Plan provides several types of monthly pensions for qualified Laborers who retire from Covered Employment. They are:

a. A Regular Pension for persons age 63 or older with at least 5 Pension Credits, including one earned during the contribution period.

b. An Early Retirement Pension for persons who choose to retire between the ages of 53 and 63 and have at least 5 Pension Credits, including one earned during the Contribution Period.

c. A Disability Pension for persons who become permanently and totally disabled, have at least 5 Pension Credits, worked 250 hours in Covered Employment in

the Plan Credit Year the disability began or either of the two previous Plan Credit Years, and have at least one Pension Credit earned at a contribution rate of at least $0.18.

d. A Deferred Pension for persons who have at least 5 Pension Credits.

e. A Service-Only Pension for persons who have 30 or more Pension Credits or 30 or more Years of Vesting Service in Covered Employment. A person who meets either of these requirements may retire at any age without reduction of payment before age 63.

f. A Reciprocal Pension to permit a Laborer to combine his Pension Credits earned from this Pension Fund and other Laborers' pension funds which have signed the Laborers' International Reciprocal Agreement so that he can qualify for a pension.

g. A pension for persons who have attained Normal Retirement Age (age 65 at the earliest) and are actively at work, regardless of their number of Pension Credits or Years of Vesting Service.

5. The monthly pension amount payable is based on the number of Pension Credits earned by an employee and the contribution rates at which he worked. On the following pages are examples of current Retirement benefits.

6. Once an employee retires, benefits will be continued for life so long as he remains retired. Upon his death, benefits may be continued to his surviving spouse.

7. In certain instances, survivor benefits or death benefits are also payable if an employee dies before Retirement.

8. An employee who is eligible for a Regular, Early Retirement, Disability or Service-Only Pension of $100 or more per month may elect to have his monthly pension

benefit reduced by not more than 10% in order that he may receive a lump-sum payment when he retires.

9. All pension benefits from this Plan are in addition to any benefits that a retired employee may receive under the Social Security law.

10. An appeal procedure is provided for a person whose application for benefits is partially or fully denied (see page 96).

11. Certain types of employment by a pensioner are prohibited under the Plan and result in the suspension of a pensioner's monthly pension during that period. A pensioner who returns to work as a Laborer must notify the Fund Office. The Plan rules regulating employment after Retirement and the appropriate appeal procedure are described in Article 6 of the Plan.

12. All Laborers who retire under the Plan receive a special newsletter which provides interesting information about the industry and your Plan.

* * *

EXCERPTS FROM CENTRAL LABORERS' PENSION FUND RESTATED PLAN RULES AND REGULATIONS, AMENDED AND RESTATED EFFECTIVE OCTOBER 1, 1994

(Previously Amended and Restated Effective October 1, 1989)

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APPENDIX B
CENTRAL LABORERS PENSION FUND
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* * *

ARTICLE 1
DEFINITIONS

Section 1.1. Trust Agreement.

"Trust Agreement" means the Agreement and Declaration of Trust establishing the Central Laborers' Pension Fund dated effective as of January 1, 1965 and as thereafter amended and restated.

Section 1.2. Pension Fund or Fund.

"Pension Fund" or "Fund" means the Central Laborers' Pension Fund established under the Trust Agreement.

* * *

Section 1.4. Pension Plan or Plan.

"Pension Plan" or "Plan" means this document as adopted by the Trustees and as thereafter amended by the Trustees.

* * *

Section 1.6. Contributing Employer or Employer.

"Contributing Employer" or "Employer" means an employer signatory to a Collective Bargaining Agreement with the Union requiring contributions to this Fund, an employer (including the Union) signatory to any other agreement requiring contributions to this Fund who, in writing, adopts and agrees to be bound by the terms of the Trust Agreement

and such other persons considered an employer under the Trust Agreement. An employer shall not be deemed a Contributing Employer simply because it is part of a controlled group of corporations or of a trade or business under common control, some other part of which is a Contributing Employer.

* * *

Section 1.8. Employee.

"Employee" means an employee covered by a Collective Bargaining Agreement or any written agreement requiring Employer contributions on his behalf including such other persons who can be considered an Employee under the Trust Agreement. However, no officer or stockholder having a direct or indirect controlling interest in any corporation which now or hereafter has a Collective Bargaining Agreement with the Union requiring periodic contributions to the Pension Fund; or any partner of a partnership or member of an organization or association which now or hereafter has a Collective Bargaining Agreement with the Union requiring periodic contributions to the Pension Plan shall be considered an Employee under this Pension Plan.

Section 1.9. Covered Employment.

"Covered Employment" means employment of an Employee by an Employer for which the Employer is obligated by its Agreement to contribute to the Fund, including such employment prior to the Contribution Period which if performed during the Contribution Period would have resulted in contributions being paid to the Fund.

Section 1.10. Participant.

"Participant" means a Pensioner or an Employee who meets the requirements for participation in the Plan as set forth in Article 2, or a former Employee who has acquired a right to a pension under this Plan.

* * *

Section 1.12. Pensioner.

"Pensioner" means a person to whom a pension under this Plan is being paid or to whom a pension would be paid but for time for administrative processing.

* * *

Section 1.14. Normal Retirement Age.

"Normal Retirement Age" means age 65, or, if later, the age of the Participant on the tenth anniversary of his participation.

Notwithstanding the foregoing, for a Participant who completes one or more hours of Service after September 30, 1987, "Normal Retirement Age" means age 65 or, if later, the age of the Participant on the fifth anniversary of his participation.

In calculating the fifth or tenth anniversary of participation, participation before a Permanent Break in Service shall not be counted.

* * *

Section 1.19. Service.

Each Employee will be credited with an hour of Service for:

(a) each hour for which an Employee is directly or indirectly paid or entitled to payment by the Employer for the performance of duties. These hours shall be credited to the Employee for the computation period or periods in which the duties are performed; and

(b) each hour for which an Employee is paid, or entitled to payment, by an Employer, directly or indirectly, including payments for disability from the Central Laborers' Welfare Fund but excluding any time

compensated under a workers' or workmen's compensation or unemployment compensation law or a plan pursuant to a mandatory disability benefits law and excluding any hours of nonwork time in excess of 501 in any one continuous period. Two periods of paid nonwork time shall be deemed continuous if they are compensated for the same reason (e.g., disability) and are not separated by at least ninety days. These hours shall be credited to the Employee for the computation period or periods in which the nonperformance period occurred; and

(c) each hour for which back pay, irrespective of mitigation of damage, has been either awarded or agreed to by the Employer. These hours shall be credited to the Employee for the computation period or periods to which the award or agreement pertains rather than the computation period in which the award, agreement, or payment was made.

* * *

ARTICLE 3
PENSION ELIGIBILITY AND AMOUNTS

Section 3.1. General.

This article sets forth the eligibility conditions and benefit amounts for the pensions provided by this Plan. The accumulation and retention of Pension Credits and Years of Vesting Service for eligibility are subject to the provisions of Article 4. The benefit amounts are subject to reduction on account of the Husband-and-Wife Pension (Article 5). Entitlement of an eligible Participant to receive pension benefits is subject to his retirement and application for benefits, as provided in Article 6.

Section 3.2. Special Benefit at or After Normal Retirement Age.

(a) A Participant who has attained Normal Retirement Age shall be eligible for a pension regardless of his number of Pension Credits or Years of Vesting Service. The amount of the pension shall be determined in accordance with Section 3.18.

(b) An individual will not be a Participant at Normal Retirement Age, and, therefore, will not be entitled to a benefit under Subsection (a) above, unless any prior One-Year Break in Service has been repaired in accordance with Section 2.4.

Section 3.3. Regular Pension—Eligibility.

(a) For retirements on or after October 1, 1993, a Participant may retire on a Regular Pension if he meets the following requirements:

(1) he has attained age 63, and

(2) he has at least five Pension Credits, of which at least one Pension Credit was based on Work in Covered Employment during the Contribution Period.

(b) For retirements on or after October 1, 1992 and prior to October 1, 1993, a Participant may retire on a Regular Pension if he meets the following requirements:

(1) he has attained age 63, and

(2) he has at least seven Pension Credits, of which at least one Pension Credit was based on Work in Covered Employment during the Contribution Period.

(c) For retirements on and after October 1, 1987 and prior to October 1, 1992, a Participant may retire on a Regular Pension if he meets the following requirements:

(1) He has attained age 63, and

(2) he has at least 10 Pension Credits, of which at least one Pension Credit was based on work in Covered Employment during the Contribution Period

* * *

Section 3.5. Early Retirement Pension—Eligibility.

(a) For retirements on or after October 1, 1993, a Participant may retire on an Early Retirement Pension if he meets the following requirements:

(1) he has attained age 53; and

(2) he has at least five Pension Credits, of which at least one Pension Credit was based on Work in Covered Employment during the Contribution Period.

(b) For retirements on or after October 1, 1992 and prior to October 1, 1993, a Participant may retire on an Early Retirement Pension if he meets the following requirements:

(1) he has attained age 53; and

(2) he has at least seven Pension Credits, of which at least one Pension Credit was based on Work in Covered Employment during the Contribution Period.

(c) For retirements on or after October 1, 1987 and prior to October 1, 1992, a Participant may retire on an Early Retirement Pension if he meets the following requirements:

(1) He has attained age 53, and

(2) he has at least 10 Pension Credits of which at least one Pension Credit was based on work in Covered Employment during the Contribution Period.

Section 3.6. Early Retirement Pension—Amount.

The monthly amount of the Early Retirement Pension is the amount of the Regular Pension reduced by a factor appropriate to the Employee's attained age at the effective date of his Early Retirement Pension in accordance with the Table of Early Retirement Factors as shown in Appendix A.

* * *

Section 3.13. Service-Only Pension—Eligibility.

A Participant may retire on a Service Pension on or after October 1, 1986 if he has a total of 30 Pension Credits or 30 Years of Vesting Service based on Work in Covered Employment. Work in Covered Employment before the Contribution Period shall be credited as defined in Section 4.1(b).

Section 3.14. Service-Only Pension—Amount.

The monthly amount of the Service-Only Pension is the same as the Regular Pension prior to any adjustment for payment in the form of a Husband-and-Wife Pension.

* * *

Section 3.24. Application of Benefit Increases.

The pension to which a Participant is entitled shall be determined under the terms of the Plan as in effect at the time the Participant separates from Covered Employment.

A Participant shall be deemed to have separated from Covered Employment on the last day of work which is followed by a One-Year Break in Service except if he subsequently earns at least one Year of Vesting Service.

* * *

ARTICLE 4
PENSION CREDITS AND
YEARS OF VESTING SERVICE

Section 4.1. Pension Credits.

(a) For Employment during the Contribution Period.

(1) General Rule.

For periods during the Contribution Period, a Participant shall be credited with Pension Credits on the basis of his

hours of work in Covered Employment on which contributions to the Pension Fund were made. For hours of Work on or after October 1, 1994, Pension Credit shall be granted in accordance with the following schedule:

[Schedule Omitted]

* * *

Section 4.2. Year of Vesting Service.

(a) General Rule. A Participant shall be credited with one Year of Vesting Service for each Plan Credit Year during the Contribution Period (including periods before he became a Participant) in which he completed at least 1,000 hours of Service in Covered Employment. This rule is subject to the provisions of the following subsections.

* * *

ARTICLE 6

APPLICATIONS, BENEFIT PAYMENTS, RETIREMENT AND BENEFIT SUSPENSIONS

* * *

Section 6.3. Action of Trustees.

The Trustees shall, subject to the requirements of the law, be the sole judges of the standard of proof required in any case and the application and interpretation of this Plan, and decisions of the Trustees shall be final and binding on all parties.

Wherever in the Plan the Trustees are given discretionary powers, the Trustees shall exercise such powers in a uniform nondiscriminatory manner.

All questions or controversies of whatsoever character arising in any manner or between any parties or persons in connection with this Plan or its operation, whether as to any claim for benefits, as to the construction of the language of

this Plan or any rules and regulations adopted by the Trustees, or as to any writing, decision, instrument or account in connection with the operation of the Plan or otherwise, shall be submitted to the Board of Trustees for decision. In the event a claim for benefits has been denied, no lawsuit or other action against the Fund or its Trustees may be filed until the matter has been submitted for review under the ERISA-mandated review procedure set forth in Section 6.4. The decision on review shall be binding upon all persons dealing with the Plan or claiming any benefit hereunder, except to the extent that such decision may be determined to be arbitrary or capricious by a court or arbitrator having jurisdiction over such matter.

Section 6.4. Right to Appeal.

(a) The Employee shall notify the Fund Office of his desire to apply for benefits and upon such notification, the Fund Office shall furnish the Employee with an application form and instructions on how to complete the form and submit other documentary evidence required to supplement said application.

(b) Upon receipt of the completed application and supporting documentary evidence, the Fund Office shall review the same and if necessary shall advise the Employee of any additional information, documents or explanations required. Upon receipt of all materials requested, unless notified that the Employee cannot furnish the materials requested, the Fund Office shall promptly review the application and supporting documents and then file same with the Board of Trustees along with the recommendations as to approval or denial of the application and the reasons therefor.

(c) The Board of Trustees at its next regular monthly meeting subsequent to receipt of the applications and recommendations will consider the same and approve or deny the benefits applied for.

(d) In the event the application is denied by the Board of Trustees, notice of said decision shall be promptly communicated, in writing, to the Employee.

(e) Upon denial of the application by the Board of Trustees, the Employee shall be entitled to the following rights and procedures:

(1) A statement of the reason or reasons for denial of the application.

(2) The right to submit additional proofs.

(3) The right to examine any evidence in possession of the Fund adverse to the application.

(4) The right within 60 days of receipt of the notice of denial of his application to appeal the decision of the Board of Trustees to the full Board of Trustees, the same to be done by written petition addressed to the Board of Trustees setting forth the precise grounds for the appeal, that is, a clear statement as to which of the reasons for the denial of the application he disagrees with and why he disagrees with the same.

(5) The right, upon appeal to the Board of Trustees, to request in his appeal petition to appear before said Board for a hearing on the merits of his appeal petition. In the event such a request is made, the hearing shall be held at the next regular meeting of the full Board of Trustees or at such other time as may be agreed upon by the Employee and said Board of Trustees. In the absence of such a request, the Board of Trustees shall at its next regular meeting review the entire application and supporting evidence and approve or deny the application.

(6) The right to present witnesses, evidence and arguments at the hearing and cross examine such witnesses as may appear and offer evidence opposed to the application.

(7) The legally recognized rules of evidence shall be a guide for the conduct of said hearing but shall not be directly applied to the same.

(8) Upon completion of the hearing and any adjournments thereof and after full and complete opportunity to be heard has been afforded the Employee, the Board of Trustees shall, within 30 days thereafter, notify the Employee, in writing, of its decision allowing or denying the application and appeal and, in the event of a denial, the notice shall set forth the reason for said denial.

(9) The decision of the Board of Trustees shall be final and binding on all parties interested in the same and shall not be subject to further review by any court or the Fund.

(f) In the event of denial of the application by the Board of Trustees, the notice of decision of the Board of Trustees required by Subsection 6.4(d) shall contain a statement of all of the rights and procedures set forth in Subsection 6.4(e) hereof.

* * *

Section 6.6. Retirement.

(a) General Rule. To be considered retired, a Participant must have separated from Covered Employment and not be engaged in disqualifying employment as defined in Section 6.7(a) and (b).

(b) Exceptions. Effective June 1, 1993, a Participant who has separated from his previous employment, as defined in Subsection 6.6(a), and who has attained age 53 shall be considered retired notwithstanding subsequent employment or reemployment with a covered Employer for less than 40 hours in any month.

Section 6.7. Suspension of Benefits.

(a) Before Age 53.

(1) Effective on and after October 1, 1993, the monthly benefit shall be suspended for any month in which the Participant is employed in Disqualifying Employment, as defined in Paragraph 6.7(b)(1), before he has attained age 53.

(2) Effective October 1, 1994, a Participant retires on a 30 Credit Pension, his monthly benefit shall be suspended for any month in which he worked or was paid for at least 40 hours in "Disqualifying Employment."

(b) Age 53 or Older and before Age 60.

(1) Effective on and after October 1, 1993, the monthly benefit shall be suspended for any month in which the Participant worked or was paid for at least 40 hours in Disqualifying Employment, as defined below, upon attaining age 53 and before he has attained age 60.

"Disqualifying Employment" for the period before age 60, is:

(A) employment with an Employer in a job classification of any type specified and covered in the Collective Bargaining Agreement;

(B) employment in work regularly performed by Laborers or any other Building Trades Craftsmen;

(C) employment in the same or related business as any Contributing Employer;

(D) employment in any work which is or may be under the jurisdiction of the Union; or

(E) employment of any kind involving or resulting in earnings in excess of the maximum annual earnings permitted by the Social Security Administration before any reduction is made in the amount of a person's Social Security benefits.

(2) If the Participant has failed to notify the Plan of employment that may be the basis for suspension of benefits under Paragraph (1) above, in accordance with the notification requirements of Subsection 6.7(d), or has willfully misrepresented to the Plan with respect to disqualifying employment, the monthly benefit shall be suspended for an additional period of from six (6) to twelve (12) months over and above the suspension period of the preceding sentence, as the Board of Trustees shall determine based on the lateness of the notification and the reasons for the failure to notify in a timely manner.

(b) After Age 60.

(1) If the Participant has attained age 60, his monthly benefit shall be suspended for any month in which he worked or was paid for at least 40 hours in "Disqualifying Employment". After attainment of age 60, "Disqualifying Employment" means employment or self-employment that is in an industry covered by the Plan when the Participant's pension began, in the geographic area covered by the Plan when the Participant's pension began and in any occupation in which the Participant worked under the Plan at any time or any occupation covered by the Plan at the time the Participant's pension payments began. However, if a Participant worked in Covered Employment only in a skilled trade or craft, that is, as a Laborer, employment or self-employment shall be disqualifying only if it is in work that involves the skill or skills of that trade or craft directly or, as in the case of supervisory work, indirectly. However, in any event, any work for at least 40 hours in a month for which contributions are required to be made to the Plan shall be disqualifying.

(2) The term "industry covered by the Plan" means any industry in which Employees covered by the Plan

were employed when the Participant's pension began or, but for suspension under this article, would have begun.

(3) The term "geographic area covered by the Plan" means the State of Illinois and all of any standard metropolitan statistical area which falls within Illinois and any other area in which Covered Employment was performed when the Participant's pension began or, but for suspension under this article, would have begun.

The geographic area covered by the Plan shall also include any area covered by a plan which, under a reciprocal agreement in effect when the Participant's pension payments began, had forwarded contributions to this Plan, on the basis of which this Plan accrued benefits for the Participant.

(4) If a retired Participant re-enters Covered Employment to an extent sufficient to cause a suspension of benefits, and his pension payments are subsequently resumed, the industry and area covered by the Plan "when the Participant's pension began" shall be the industry and area covered by the Plan when his pension was resumed.

(5) Paid non-work time shall be counted toward the measure of 40 hours if paid for vacation, holiday, illness or other incapacity, layoff, jury duty, or other leave of absence.

(6) Notwithstanding any other provision of this section, as of April 1 of the calendar year following the year in which the Participant attains age 70 1/2, no employment will be considered Disqualifying Employment with respect to such Participant.

(7) Effective on and after October 1, 1994, all Pensioners (except those receiving a Disability Pension) may work up to 39 hours per month without suspension of their monthly pension benefit.

(c) Definition of Suspension. "Suspension of benefits" for a month means non-entitlement to benefits for the month. If benefits were paid for a month for which benefits were later determined to be suspended, the overpayment shall be recoverable through deductions from future pension payments, pursuant to Subsection 6.7(g), and in accordance with Section 6.3.

(d) Notices.

(1) Upon commencement of pension payments, the Trustees shall notify the Pensioner of the Plan rules governing suspension of benefits, including identity of the industries and area covered by the Plan. If benefits have been suspended and payment resumed, new notification shall, upon resumption, be given to the Participant, if there has been any material change in the suspension rules or the identity of the industries or area covered by the Plan.

(2) A Pensioner shall notify the Plan in writing within 15 days after starting work of a type that is or may be disqualifying under the provisions of the Plan and without regard to the number of hours of such work (that is, whether or not less than 40 hours in a month). If a Pensioner has worked in disqualifying employment in any month and has failed to give timely notice to the Plan of such employment, the Trustees shall presume that he worked for at least 40 hours in such month and any subsequent month before the Participant gives notice that he has ceased disqualifying employment. The Participant shall have the right to overcome such presumption by establishing to the satisfaction of the Trustees that his work was not in fact an appropriate basis, under the Plan, for suspension of benefits.

If a Pensioner has worked in disqualifying employment for any number of hours for a contractor at a building or construction site and he has failed to give

timely notice to the Plan of such employment, the Trustees shall presume that he has engaged in such work for as long as the contractor has remained actively engaged at that site. The Participant shall have the right to overcome such presumption by establishing to the satisfaction of the Trustees that his work was not in fact an appropriate basis, under the Plan, for suspension of his benefits.

The Trustees shall inform all retirees at least once every 12 months of the reemployment notification requirements and the presumptions set forth in this paragraph.

(3) A Pensioner whose pension has been suspended shall notify the Plan when disqualifying employment has ended. The Trustees shall have the right to hold back benefit payments until such notice is filed with the Plan.

(4) A Participant may ask the Plan whether a particular employment will be disqualifying. The Plan shall provide the Participant with its determination.

(5) The Plan shall inform a Participant of any suspension of his benefits by notice given by personal delivery or first class mail during the first calendar month in which his benefits are withheld. Such notice shall include a description of the specific reasons for the suspension, copy of the relevant provisions of the Plan, reference to the applicable regulation of the U.S. Department of Labor and a statement of the procedure for securing a review of the suspension. In addition, the notice shall describe the procedure for the Participant to notify the Plan when his disqualifying employment ends. If the Plan intends to recover prior overpayments by offset under Paragraph 6.7(g)(2), the suspension notice shall explain the offset procedure and identify the amount expected to be recovered and the periods of employment to which they relate.

(e) Review. A Participant shall be entitled to a review of a determination suspending his benefits by written request filed with the Trustees as set forth in Section 6.4.

The same right of review shall apply, under the same terms, to a determination by or on behalf of the Trustees that contemplated employment will be disqualifying.

(f) Resumption of Benefit Payments.

(1) Benefits shall be resumed for the months after the last month for which benefits were suspended, with payments beginning no later than the third month after the last calendar month for which the Participant's benefits was suspended, provided the Participant has complied with the notification requirements of Paragraph 6.7(d)(3) above.

(2) Overpayments attributable to payments made for any month or months for which the Participant had disqualifying employment shall be deducted from pension payments otherwise paid or payable subsequent to the period of suspension. A deduction from a monthly benefit for a month after the Participant attained Normal Retirement Age shall not exceed 25 percent of the pension amount (before deduction), except that the Plan may withhold up to 100 percent of the first pension payment made upon resumption after a suspension. If a Pensioner dies before recovery of overpayments has been completed, deductions shall be made from the benefits payable to his Beneficiary or Spouse, subject to the 25 percent limitation on the rate of deduction.

* * *

Section 6.9. Vested Status or Non-forfeitability.

(a) The Employee Retirement Income Security Act requires that certain of the benefits under this Plan be vested (in the term used in the Act, "nonforfeitable").

(b) Vested Status is earned as follows:

(1) A Participant's right to his normal retirement benefit is nonforfeitable upon his attainment of Normal Retirement Age except to the extent that benefits are cancelled pursuant to Section 7.4 because the employer has ceased to contribute to the Plan with respect to the employment unit in which the Participant was employed.

(2) A Participant, excluding any former Participants who were deceased before October 1, 1993, acquires Vested Status after completion of five years of Vesting Service.

A Participant, excluding any former Participants who were deceased before October 1, 1992, acquires Vested Status after completion of seven Years of Vesting Service (except for Years of Vesting Service that are not taken into account because of a Permanent Break in Service).

(c) ERISA also provides certain limitations on any plan amendment that may change the Plan's vesting schedule. In accordance with those legal limitations, no amendment of this Plan may take away a Participant's Vested Status if he has already earned it at the time of the amendment. Also, an amendment may not change the schedule on the basis of which a Participant acquires Vested Status, unless each Participant who has credit for at least three Years of Vesting Service at the time the amendment is adopted or effective (whichever is later) is given the option of achieving Vested Status on the basis of the pre-amendment schedule. That option may be exercised within 60 days after the latest of the following dates:

(1) When the amendment was adopted,

(2) when the amendment became effective, or

(3) when the Participant was given written notice of the amendment.

(d) For purposes of applying the provisions of this section and of determining when a Participant has acquired non-forfeitable rights, as defined under the law, the vesting schedule of this Plan consists of 100 percent non-forfeitability for a Participant who has completed at least five, seven or 10 Years of Vesting Service, whichever is applicable. While this Plan provides Regular, Deferred, Early Retirement, Minimum, Service-Only, and Disability Pensions on the basis of requirements that may be met by some Participants who have not completed five, seven or 10 Years of Service whichever is applicable. Such eligibility rules represent provisions of the Plan above and beyond its vesting schedule.

* * *

ARTICLE 8
AMENDMENTS

Section 8.1. Amendments.

This Plan may be amended at any time by the Trustees, consistent with the provisions of the Trust Agreement. However, no amendment may decrease the accrued benefit of any Participant, except:

(a) As necessary to establish or maintain the qualification of the Plan or the Trust Fund under the Internal Revenue Code and to maintain compliance of the Plan with the requirements of ERISA, or

(b) If the amendment meets the requirements of Section 302(c)(8) of ERISA and Section 412(c)(8) of the Internal Revenue Code, and the Secretary of Labor has been notified of such amendments and has either approved of it or, within 90 days after the date on which such notice was filed, he failed to disapprove.

EXCERPTS FROM AMENDMENT NO. 4 TO THE PENSION PLAN OF THE CENTRAL LABORERS' PENSION FUND, EFFECTIVE OCTOBER 1, 1996

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6. Subsections (a) and (b) of Section 6.7 are deleted in their entirety and replaced with the following:

(a) Suspension of Benefits Before Age 60.

The monthly benefit shall be suspended for any month in which the Participant worked or was paid for at least 40 hours in Disqualifying Employment, as defined in Section 6.7 (b).

(b) Disqualifying Employment Before Age 60.

(1) "Disqualifying Employment" for the period before age 60, is employment with an Employer in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker).

(2) If the Participant has failed to notify the Plan of employment that may be the basis for suspension of benefits under Paragraph (1) above, in accordance with the notification requirements of Subsection 6.7 (d), or has willfully misrepresented to the Plan with respect to disqualifying employment, the monthly benefit shall be suspended for an additional period of from six (6) to twelve (12) months over and above the suspension period of the preceding sentence, as the Board of Trustees shall determine based on the lateness of the notification and the reasons for the failure to notify in a timely manner.

(3) The Trustees shall determine that a Participant is working in Disqualifying Employment by requesting that the Participant provide them with a copy of wage, payroll, or other employment records including but not limited to copies of his Social Security earnings records.

* * *

EXCERPTS FROM AMENDMENT NO. 5 TO THE PENSION PLAN OF THE CENTRAL LABORERS' PENSION FUND, EFFECTIVE OCTOBER 1, 1996

3. Effective January. 1, 1997, Section 3.13 is deleted in its entirety, and replaced with the following:

Section 3.13. Service-Only Pension—Eligibility.

A Participant may retire on a Service-Only Pension if he meets one of the following requirements:

(a) A Participant who first entered the Plan on or after January 1, 1997, or who entered the Plan on or after January 1, 1997 after incurring a Permanent Break in Service, as defined in Sections 4.3 (c), (d) or (e), may retire on a Service Pension if he has a total of 25 Years of Vesting Service, as defined in Section 4.2, based on Work in Covered Employment. Work in Covered Employment before the Contribution Period shall be credited as defined in Section 4.1(b).

Vesting Service for purposes of the Service-Only Pension, as defined in Section 3.13(a), must be earned as a Participant in the Central Laborers' Pension Fund.

(b) A Participant who entered the Plan prior to January 1, 1997, may retire on a Service Pension if he has a total of 30 Pension Credits or 30 Years of Vesting Service based on Work in Covered Employment. Work in Covered Employment before the Contribution Period shall be credited as defined in Section 4.1(b).

* * *

8. Subsection (a) of Section 4.2 is deleted in its entirety and replaced with the following:

(a) General Rules.

(1) A Participant shall be credited with one Year of Vesting Service (or fraction thereof), for each Plan Credit Year during the Contribution Period (including periods before he became a Participant) on or after October 1, 1996 according to the following schedule:

Hours of Work in Covered Employment During a Plan Credit Year	Years of Vesting Service
0-199	0.0
200-299	0.2
300-399	0.3
400-499	0.4
500-599	0.5
600-699	0.6
700-799	0.7
800-899	0.8
900-999	0.9
1,000 or more	1.0

(2) A Participant shall be credited with one Year of Vesting Service for each Plan Credit Year during the Contribution Period (including periods before he became a Participant) prior to October 1, 1996 in which he completed at least 1,000 hours of Service in Covered Employment.

These rules are subject to the provisions of the following subsections.

EXCERPTS FROM AMENDMENT NO. 6 TO THE PENSION PLAN OF THE CENTRAL LABORERS' PENSION FUND, EFFECTIVE OCTOBER 1, 1997

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6. Section 6.7 (b) (6) is deleted in its entirety and amended to read as follows:

Notwithstanding any other provision of this section, prior to October 1, 1997, no employment after April 1 of the calendar year following the calendar year in which the Participant attains age 70-½ shall be considered Disqualifying Employment with respect to such Participant.

Effective October 1, 1997, if the Participant attains age 70-½ prior to January 1, 1996, he may elect that no employment after April 1 of the calendar year following the calendar year in which he attains age 70-½ shall be considered Disqualifying Employment with respect to such Participant. If he elects to defer commencement of his Pension until the April 1 following the calendar year is [sic] which he retires, all employment after the April 1 following the calendar year is [sic] which he retires shall be considered Disqualifying Employment. If the participant attains age 70-½ after December 31, 1995, all employment after the April 1 following the calendar year is [sic] which he retires shall be considered Disqualifying Employment.

EXCERPTS FROM AMENDMENT NO. 7 TO THE PENSION PLAN OF THE CENTRAL LABORERS' PENSION FUND, EFFECTIVE OCTOBER 1, 1998:

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1. Section 1.6, Contributing Employer or Employer, is deleted in its entirety and amended to read as follows:

Section 1.6—Contributing Employer or Employer:

"Contributing Employer" or "Employer" means an employer signatory to a Collective Bargaining Agreement with the Union requiring contributions to this Fund or an employer (including the Union) signatory to any other agreement requiring contributions to this Fund who, in writing, adopts and agrees to be bound by the terms of the Trust Agreement and such other persons considered an employer under the Trust Agreement.

"Non-Construction Contributing Employer", "Non-Construction Employer" or "Employer" means an employer who becomes signatory, to a Collective Bargaining Agreement with the Union requiring contributions to this Fund on or after May 1, 1998 with employees who do not work in the construction industry or an employer with non-bargained employees that becomes signatory to any other agreement requiring contributions to this Fund on or after May 1, 1998 who, in writing, adopts and agrees to be bound by the terms of the Trust Agreement and such other persons considered an employer under the Trust Agreement.

An employer or non-construction employer shall not be deemed a Contributing Employer or Non-Contributing Employer simply because it is part of a controlled group of corporations or of a trade or business under common control, some other part of which is a Contributing Employer or Non-Contributing Employer.

2. Section 1.8, Employee, is deleted in its entirety and amended to read as follows:

Section 1.8 - Employee:

"Employee" means an employee covered by a Collective Bargaining Agreement or any written agreement requiring contributions on his behalf including such other persons who can be considered an Employee under the Trust Agreement.

* * *

5. Section 3.4, Regular Pension—Amount, is deleted in its entirety and amended to read as follows:

Section 3.4—Regular Pension—Amount:

(a) For retirements on or after October 1, 1994, the monthly amount of the Regular Pension is equal to the sum of (1) and (2) below:

(1) $4.03 for each Pension Credit based on work in Covered Employment prior to January 1, 1965, plus

(2) an amount for each Pension Credit earned during the Contribution Period in accordance with the following schedule:

Pension Credit Earned prior to 10/1/76 at a Contribution Rate of:	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit
—	$.10 to .11	$ 3.48	$ 1.00	$ 47.04
$ .10	.12 to .17	4.36	1.05	49.65
.15	.18 to .23	6.63	1.10	52.26
.20	.24 to .29	9.40	1.15	54.88
.25	.30 to .35	12.22	1.20	57.45
.30	.36 to .41	14.98	1.25	60.13
.35	.42 to .47	17.77	1.30	62.72
.40	.48 to .53	20.55	1.35	65.34
.45	.54 to .59	23.35	1.40	67.96
.50	.60 to .64	26.14	1.45	70.54
	.65 to .69	28.76	1.50	73.17
	.70 to .74	31.37	1.55	75.78
	.75 to .79	33.96	1.60	78.42
	.80 to .84	36.59	1.65	81.02
	.85 to .89	39.19	1.70	83.63
	.90 to .94	41.79	1.75	86.22
	.95 to .99	44.43	1.80	88.85
	$ 1.85	$ 91.40	$ 2.95	$138.90

Pension Credit Earned prior to 10/1/76 at a Contribution Rate of:	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit
	1.90	94.22	3.00	140.98
	1.95	96.70	3.05	143.07
	2.00	99.32	3.10	145.15
	2.05	101.40	3.15	147.23
	2.10	103.47	3.20	149.31
	2.15	105.55	3.25	151.39
	2.20	107.30	3.30	153.47
	2.25	109.72	3.35	155.55
	2.30	111.80	3.40	157.63
	2.35	113.88	3.45	159.71
	2.40	115.96	3.50	161.79
	2.45	118.05	3.55	163.87
	2.50	120.14	3.60	165.95
	2.55	122.23	3.65	168.03
	2.60	124.31	3.70	170.12
	2.65	126.40	3.75	172.20
	2.70	128.47	3.80	174.28
	2.75	130.56	3.85	176.36

Pension Credit Earned prior to 10/1/76 at a Contribution Rate of:	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit
	2.80	132.64	3.90	178.44
	2.85	134.73	3.95	180.52
	2.90	136.81	4.00	182.60

(b) Effective for initial retirements on or after October 1, 1998, in the event an Employee earned Pension Credit during a Plan Credit Year based on more than one Contribution Rate, the Contribution Rate which determines his pension benefit for all Pension Credit earned during such Plan Credit Year shall be the average of the Contribution Rate for each hour the Employee worked in Covered Employment.

(c) Effective for initial retirements prior to October 1, 1998, in the event an Employee earned Pension Credit during a Plan Credit Year based on more than one Contribution Rate, the Contribution Rate which determines his pension benefit for all Pension Credit earned during such Plan Credit Year shall be the highest Contribution Rate at which an Employee worked in Covered Employment for at least 500 hours (200 hours between October 1, 1994 and October 1, 1996 and 250 hours before October 1, 1994) in that Plan Credit Year.

If an Employee did not work at least 500 hours (200 hours between October 1, 1994 and October 1, 1996 and 250 hours before October 1, 1994) at any one

Contribution Rate in that Plan Credit Year, but did work for a total of at least 500 hours (200 hours between October 1, 1994 and October 1, 1996 and 250 hours before October 1, 1994) for that Plan Credit Year, the Contribution Rate which determines his pension benefit for all Pension Credit earned during such Plan Credit Year shall be based on the average Contribution Rate for that period. The average Contribution Rate will be determined as follows:

(1) The contributions paid to the Pension Fund on behalf of an Employee during the Plan Credit Year shall be totalled;

(2) The number of hours for which contributions were paid during that same Plan Credit Year on behalf of an Employee shall be totalled:

(3) The total contributions shall be divided by the total hours. The result shall then be rounded to the nearest whole cent (or to the nearest multiple of 5 cents, for Plan Credit Years prior to October 1, 1976) and that shall be the average Contribution Rate.

(d) This subsection (d) shall apply to Non-Construction Employers who become signatory to a Collective Bargaining Agreement on or after May 1, 1998 or Employers with non-bargained employees who become signatory to any other agreement requiring contributions to this Fund on or after May 1, 1998.

(1) Employees of an Employer under this subsection (d) shall earn the monthly benefit amount per Pension Credit as set forth in Section 3.4(a)(2) except for contribution rates below $0.60 as set forth below:

Hourly Contribution Rate	Monthly Benefit Amount Per Pension Credit
$0.10	$ 8.65
$0.20	$13.20
$0.30	$17.75
$0.40	$21.65
$0.50	$25.30

(2) If an Employee covered under this subsection (d) completes one Year of Vesting Service after his Employer begins participation in this Fund, then he shall be entitled to a monthly benefit for each year of Vesting Service earned for his employment prior to his Employer participating in this Fund. The monthly benefit amount shall be $15.00 for each year of Vesting Service for his employment prior to his Employer participating in this Fund.

(3) If an Employer covered under this subsection (d) withdraws from the Fund within five years of participation, then only the pension associated with years of Vesting Service for his employment prior to his Employer participating in this Fund that was fully funded shall be granted to that Employer's Participants. The funded amount shall be determined by the Fund's actuary. The monthly benefit amount of any Participant who retired during the five year period will not be reduced as a result of this provision.

* * *

17. Section 6.7 is deleted and amended in its entirety to read as follows:

Section 6.7 - Suspension of Benefits:

(a) An Employee shall have his pension suspended for any period of Disqualifying Employment as defined below.

(b) For Employees who initially retired prior to October 1, 1998, Disqualifying Employment shall be defined as follows:

(1) Initially retired prior to the Participant's 53rd birthday: Disqualifying Employment with an Employer in any capacity in the construction industry (either as a union or non-union construction worker).

(2) Initially retired on or after the Participant's 53rd birthday but before the Participant turned age 70-½: Disqualifying Employment is employment as defined in Section 6.7(b)(1) for any month in which the Employee works 40 or more hours per month.

(3) Initially retired after the Participant turned age 70-½: There shall be no Disqualifying Employment.

(c) For Employees who initially retire on or after October 1, 1998, Disqualifying Employment shall be defined as follows:

(1) Initially retire on or after the Participant's 53rd birthday Disqualifying Employment is either:

(i) Employment with an Employer in any capacity in the construction industry (either as a union or non-union construction worker), or

(ii) Employment which results in any type of compensation for services rendered, as defined by the Internal Revenue Service, which is subject to Social Security taxes and/or self-employment taxes, but only with respect to benefits accrued after September 30, 1998.

(2) Initially retire on or after the Participant's 53rd birthday but before the Participant turns age 70-½: Disqualifying Employment is employment as defined Section 6.7(b)(1) for any month in which the Employee works at least 40 hours per month.

(3) Initially retire after the Participant turns age 70-½: There is no Disqualifying Employment.

(d) Definition of Suspension. "Suspension of benefits" for a month means non-entitlement to benefits for the month. If benefits were paid for a month for which benefits were later determined to be suspended, the overpayment shall be recoverable through deductions from future pension payments, in accordance with Section 6.7(g)(2).

(e) Notices.

(1) Upon commencement of pension payments, the Trustees shall notify the Pensioner of the Plan rules governing suspension of benefits, including identity, of the industries and area covered by the Plan. If benefits have been suspended and payment resumed, new notification shall, upon resumption, be given to the Participant, if there has been any material change in the suspension rules or the identity of the industries or area covered by the Plan.

(2) A Pensioner shall notify the Plan in writing within 15 days after starting work of a type that is or may be disqualifying under the provisions of the Plan and without regard to the number of hours of such work (that is, whether or not less than 40 hours in a month). If a Pensioner has worked in disqualifying employment in any month and has failed to give timely notice to the Plan of such employment, the Trustees shall presume that he worked for at least 40 hours in such month and any subsequent month before the Participant gives notice that he has ceased disqualifying employment. The Participant shall have the right to overcome such presumption by establishing to the satisfaction of the Trustees that his work was not in fact an appropriate basis, under the Plan, for suspension of benefits.

If a Pensioner has worked in disqualifying employment for any number of hours and he has failed to give timely notice to the Plan of such employment, the Trustees shall presume that he has engaged in such work for as long as the Employer has remained actively engaged at that site. The Participant shall have the right to overcome such presumption by establishing to the satisfaction of the Trustees that his work was not in fact an appropriate basis, under the Plan, for suspension of his benefits.

The Trustees shall inform all retirees at least once every 12 months of the reemployment notification requirements and the presumptions set forth in this paragraph.

(3) A Pensioner whose pension has been suspended shall notify the Plan when disqualifying employment has ended. The Trustees shall have the

right to hold back benefit payments until such notice is filed with the Plan.

(4) A Participant may ask the Plan whether a particular employment will be disqualifying. The Plan shall provide the Participant with its determination.

(5) The Plan shall inform a Participant of any suspension of his benefits by notice given by personal delivery or first class mail during the first calendar month in which his benefits are withheld. Such notice shall include a description of the specific reasons for the suspension, copy of the relevant provisions of the Plan, reference to the applicable regulation of the U.S. Department of Labor and a statement of the procedure for securing a review of the suspension. In addition, the notice shall describe the procedure for the Participant to notify the Plan when his disqualifying employment ends. If the Plan intends to recover prior overpayments by offset under Paragraph 6.7(d) or 6.7(g)(2), the suspension notice shall explain the offset procedure and identify the amount expected to be recovered and the periods of employment to which they relate.

(f) Review. A Participant shall be entitled to a review of a determination suspending his benefits by written request filed with the Trustees as set forth in Section 6.4.

The same right of review shall apply, under the same terms, to a determination by or on behalf of the Trustees that contemplated employment will be disqualifying.

(g) Resumption of Benefit Payments.

(1) Benefits shall be resumed for the months after the last month for which benefits were suspended, with payments beginning no later than the third month after the last calendar month for which the Participant's benefits was suspended, provided the Participant has complied with the notification requirements of Paragraph 6.7(e)(3) above.

(2) If benefits were paid for a month for which benefits were later determined to be suspended, the overpayment shall be recoverable through deductions from future pension payments in an amount not to exceed 25 percent of the monthly pension amount (before deductions), except that the Plan may withhold up to 100 percent of the first monthly pension payment made upon resumption after a suspension. If a Pensioner dies before recovery of overpayments has been completed, deductions shall be made from the benefits payable to his Beneficiary or Spouse, subject to the 25 percent limitation on the rate of reduction.

(h) Notwithstanding any other provision of this section, prior to October 1, 1997, no employment after April 1 of the calendar year following the calendar year in which the Participant attains age 70-½ shall be considered Disqualifying Employment with respect to such Participant.

Effective October 1, 1997, if the Participant attains age 70-½ prior to January 1, 1996, he may elect that no employment after April 1 of the calendar year following the calendar year in which he attains age 70-½ shall be considered Disqualifying Employment with respect to such Participant. If he elects to defer

commencement of his Pension until the April 1 following the calendar year in which he retires, all employment after the April 1 following the calendar year in which he retires shall be considered Disqualifying Employment. If the participant attains age 70-½ after December 31, 1995, all employment after the April 1 following the calendar year in which he retires shall be considered Disqualifying Employment.

EXCERPTS FROM AMENDMENT NO. 8 TO THE PENSION PLAN OF THE CENTRAL LABORERS' PENSION FUND, EFFECTIVE OCTOBER 1, 1999

2. Section 3.13, Service-Only Pension-Eligibility is deleted in its entirety and amended to read as follows:

Section 3.13. Service-Only Pension—Eligibility.

(a) With respect to pension benefits earned on or after October 1, 1999, a Participant may Retire on a Service—Only Pension after he has attained age 53 provided he has at least 30 Pension Credits based on Hours of Work in Covered Employment. Hours of Work in Covered Employment before the Contribution Period shall be credited as defined in Section 4.1(b). Pension Credits for purposes of the Service-Only Pension, as defined in this Section 3.13(a), must be earned as a Participant in the Central Laborers' Pension Fund.

With respect to eligibility for the Service-Only Pension, in order for a Participant to have Retired after age 53, he must have completed (1) or (2) below.

(1) He earned at least one-half (½) of a Year of Vesting Service in each of the two (2) immediately proceeding full Plan Credit Years preceding the Plan Credit Year in which he turned age 53, or in which he left Covered Employment, if later, or

(?) He earned at least one and one-half (l-½) Years of Vesting Service during the period which consists of the two immediately preceding full Plan Credit Years and the partial Plan Credit Year in which he turned age 53, or in which he left Covered Employment, if later.

Notwithstanding the above, in no event can pension benefits earned on or after October 1, 1999 commence earlier than the first day of the month following attainment of age 53.

(b) With respect to pension benefits earned prior to October 1, 1999, a Service-Only Pension shall be payable as follows:

(1) A Participant who first entered the Plan on or after January 1, 1997, or who entered the Plan on or after January 1, 1997 after incurring a Permanent Break in Service, as defined in Sections 4.3(c), (d) or (e), may Retire on a Service-Only Pension if he has a total of 25 Years of Vesting Service, as defined in Section 4.2, based on Hours of Work in Covered Employment. Hours of Work in Covered Employment before the Contribution Period shall be credited as defined in Section 4.1(b). Vesting Service for purposes of the Service-Only Pension, as defined in Section 3.13(b), must be earned as a Participant in the Central Laborers' Pension Fund.

(2) A Participant who entered the Plan prior to January 1, 1997 may Retire on a Service-Only Pension if he has a total of 30 Pension Credits or 30 Years of Vesting Service based on Hours of Work in Covered Employment. Hours of Work in Covered Employment before the Contribution Period shall be credited as defined in Section 4.1(b).

Notwithstanding the above, in no event can pension benefits earned prior to October 1, 1999 commence earlier than the first day of the month following Retirement.

* * *

13. Section 6.7, Suspension of Benefits, is deleted in its entirety and amended to read as follows:

Section 6.7. Suspension of Benefits:

(a) A Participant shall have his pension benefit suspended for each month in which he works in Disqualifying Employment, as defined below.

(b) For Participants who Retire or re-Retire after October 1, 1999, Disqualifying Employment shall be defined as follows:

(1) For a Participant who Retires or re-Retires prior to his 53rd birthday, Disqualifying Employment during the period from his Retirement or re-Retirement date through the first day of the month following his 53rd birthday is all employment which results in any type of compensation for services rendered, as defined by the Internal Revenue Service, which are subject to Social Security taxes and/or self-employment taxes.

(2) For a Participant who Retires or re-Retires on or after his 53rd birthday, or for a Participant who Retired prior to his 53rd birthday and who remained Retired after his 53rd birthday. Disqualifying Employment during the period from his Retirement or re-Retirement date through the first day of the month following the date he turns age 70-½ is employment with an Employer in any capacity in the construction industry including, but not limited to, employment as a union or non-union construction worker, for any month in which the Participant works at least 40 hours per month.

(3) For a Participant who Retires or re-Retires after he turns age 70-½, or for a Participant who

Retired prior to age 70-½ and who remained Retired after age 70-½, there is no Disqualifying Employment.

(c) For Participants who Retired or re-Retired between October 1, 1998 and October 1, 1999 and who are receiving pension benefit payments on October 1, 1999, Disqualifying Employment shall be defined as follows:

(1) For a Participant who Retired or re-Retired prior to his 53rd birthday, Disqualifying Employment during the period from his Retirement or re-Retirement date through the first day of the month following his 53rd birthday is:

(i) All employment with an Employer in any capacity in the construction industry including, but not limited to, employment as a union or non-union construction worker.

(ii) And with respect to benefits accrued after September 30, 1998, Disqualifying Employment will also include all employment which results in any type of compensation for services rendered, as defined by the Internal Revenue Service, which are subject to Social Security taxes and/or self-employment taxes

(2) For a Participant who Retired or re-Retired on or after his 53rd birthday, or for a Participant who Retired prior to his 53rd birthday and who remained Retired after his 53rd birthday, Disqualifying Employment during the period from his Retirement or re-Retirement date through the first day of the month following the date he turns age 70-½ is employment with an Employer in any capacity in the construction industry including, but not limited to, employment as a union or non-

union construction worker, for any month in which the Participant works at least 40 hours per month.

(3) For a Participant who Retired or re-Retired after he turned age 70-½, or for a Participant who Retired prior to age 70-½ and who remained Retired after age 70-½, there is no Disqualifying Employment.

(d) For a Participants [sic] who Retired or re-Retired prior to October 1, 1998 and who are receiving pension benefit payments on October 1, 1999, Disqualifying Employment shall be defined as follows:

(1) For a Participant who Retired or re-Retired prior to his 53rd birthday, Disqualifying Employment during the period from his Retirement or re-Retirement date through the first day of the month following his 53rd birthday is all employment with an Employer in any capacity, in the construction industry including, but not limited to, employment as a union or non-union construction worker.

(2) For a Participant who Retired or re-Retired on or after his 53rd birthday, or for a Participant who Retired prior to his 53rd birthday and who remained Retired after his 53rd birthday, Disqualifying Employment during the period from his Retirement or re-Retirement date through the first day of the month following the date he turns age 70-½ is employment with an Employer in any capacity, in the construction industry including, but not limited to, employment as a union or non-union construction worker, for any month in which the Participant works at least 40 hours per month.

(3) For a Participant who Retired or re-Retired after he turned age 70-½, or for a Participant who Retired prior to age 70-½ and who remained Retired after age 70-½, there is no Disqualifying Employment.

(e) Definition of Suspension. "Suspension of pension benefits" for a month means non-entitlement to pension benefits for that month. If pension benefits were paid for any month for which pension benefits were later determined should have been suspended, the overpayment shall be recoverable through deductions from future pension benefit payments, in accordance with Section 6.7 (h).

(f) Notices.

(1) Upon commencement of pension benefit payments, the Trustees shall notify the Pensioner of the Plan rules governing suspension of pension benefits, including identity of the industries and area covered by the Plan. If pension benefits have been suspended and payment resumed, new notification shall, upon resumption, be given to the Participant, if there has been any material change in the suspension rules or the identity of the industries or area covered by the Plan.

(2) A Pensioner shall notify the Plan in writing within 15 days after starting work of any type that is or may be considered Disqualifying Employment under the provisions of the Plan, without regard to the number of hours of such work. If a Pensioner works in Disqualifying Employment in any month and fails to give timely notice to the Plan of such employment, the Trustees shall presume that he will continue working in Disqualifying Employment for each subsequent

month until he gives notice that he has ceased Disqualifying Employment. The Participant shall have the right overcome such presumption by establishing to the satisfaction of the Trustees that his work was not Disqualifying Employment.

If a Pensioner works in Disqualifying Employment and he fails to give timely notice to the Plan of such employment, the Trustees shall presume that he has engaged in Disqualifying Employment for as long as the Employer has remained actively engaged at that site. The Participant shall have the right to overcome such presumption by establishing to the satisfaction of the Trustees that his work was not Disqualifying Employment.

The Trustees shall inform all Pensioners and Beneficiaries at least once every 12 months of the re-employment notification requirements and the presumptions set forth in this Section.

(3) A Pensioner whose pension benefit has been suspended shall notify the Plan when his Disqualifying Employment has ended. The Trustees shall have the right to hold back pension benefit payments until such notice is filed with the Plan.

(4) A Participant may ask the Trustees whether a particular employment will be considered Disqualifying Employment. The Trustees shall provide the Participant with their determination.

(5) The Plan shall inform a Participant of any suspension of his pension benefits by notice given by personal delivery or first class mail during the first calendar month in which his pension benefits are suspended. Such notice shall include a description of the specific reasons for the

suspension, copy of the relevant provisions of the Plan, reference to the applicable regulation of the U.S. Department of Labor, if applicable, and a statement of the procedure for securing a review of his suspension. In addition, the notice shall describe the procedure for the Participant to notify the Plan when his Disqualifying Employment ends. If the Plan intends to recover prior overpayments by offset under Section 6.7(e) or 6.7(h), the suspension notice shall explain the offset procedure and identify the amount expected to be recovered and the periods of employment to which they relate.

(g) Review. A Participant shall be entitled to a review of the determination regarding the suspension of his pension benefits by written request filed with the Trustees as set forth in Section 6.4.

The same right of review shall apply, under the same terms, to a determination by the Trustees that contemplated employment will be considered Disqualifying Employment.

(h) Resumption of Benefit Payments.

(1) Pension benefits shall resume the first day of the month after the last month in which the Participant worked in Disqualifying Employment, with payments beginning no later than the third month after the last calendar month for which the Participant's pension benefits were suspended, provided the Participant has complied with the notification requirements.

(2) If pension benefits were paid for a month for which benefits were later determined should have been suspended, the overpayment shall be recoverable through deductions from future pension

benefit payments in an amount not to exceed twenty-five percent (25%) of the monthly pension benefit amount (before deductions), except that the Plan may withhold up to one hundred percent (100%) of the first monthly pension benefit payment made upon resumption after a suspension. If a Pensioner dies before recovery of overpayments has been completed, deductions shall be made from the benefits payable to his Beneficiary or Spouse, subject to the twenty-five percent (25%) limitation on the rate of reduction.

(i) Notwithstanding any other provision of this section, prior to October 1, 1997, no employment after April 1 of the calendar year following the calendar year in which the Participant attains age 70-½ shall be considered Disqualifying Employment with respect to such Participant.

Effective October 1, 1997, if the Participant attains age 70-½ prior to January 1, 1996, he may elect that no employment after April 1 of the calendar year following the calendar year in which he attains age 70-½ shall be considered Disqualifying Employment with respect to such Participant. If he elects to defer commencement of his pension benefit until the April 1 following the calendar year in which he Retires, all employment after the April 1 following the calendar year in which he Retires shall be considered Disqualifying Employment. If the Participant attains age 70-½ after December 31, 1995, all employment after the April 1 following the calendar year in which he Retires shall be considered Disqualifying Employment.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

CAPTION OMITTED

AFFIDAVIT OF BARRY C. McANARNEY

I, BARRY C. McANARNEY ("Affiant"), hereby swear and depose under oath that I am an adult without disability and, if called upon to testify in the above-captioned cause, would and will testify truthfully as follows:

1. Affiant is and at all times relevant hereto was the Executive Director of the Central Laborers' Pension Fund (the "Fund"); he has personal knowledge of all the factual statements made herein.

2. The Fund is a multi-employer pension fund governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and whose participants are primarily laborers in the construction industry.

3. Thomas E. Heinz ("Heinz"), a participant in the Central Laborers' Pension Plan (the "Plan") and a Plaintiff in the above-described lawsuit, elected to retire with a service credit pension from the Fund effective January 1, 1996; Mr. Heinz was born on June 2, 1956, and, accordingly, was 39 years, 6 months (rounded to the nearest month) when he retired.

4. Richard J. Schmitt ("Schmitt"), a participant in the Plan and a Plaintiff in the above-described lawsuit, elected to retire with a service credit pension from the Fund effective December 1, 1996; Mr. Schmitt was born on November 23, 1957, and, accordingly, was age 39 years (rounded to the nearest month) when he retired.

5. Plan retirees who engage in "Disqualifying Employment," as defined by the Plan, are subject to suspension of their pension benefits.

6. Under the terms of the Plan, the "normal retirement age" is 65 years of age.

7. Effective October 1, 1996, retirees under age 60, as described in Plan Section 6.7(b), would have their benefits suspended if they worked 40 hours or more in "Disqualifying Employment," which was defined as follows:

> Employment with an Employer in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker).

8. Under the foregoing "Disqualifying Employment" rule, work as a non-union supervisor would not have resulted in a suspension of benefits since such work was not considered "Disqualifying Employment."

9. On or about September 19, 1997, the Fund's actuarial consultants, the Segal Company, reported that the Fund had experienced an actuarial loss of $30.2 million for the Plan year ending September 30, 1996.

10. After analysis by and consultation with the Segal Company, the Fund's Board of Trustees adopted Plan amendments, including more restrictive "Disqualifying Employment" rules, to eliminate future actuarial losses and preserve the fiscal integrity of the Fund for the benefit of all participants and retirees.

11. Specifically, effective October 1, 1998, Plan Section 6.7(b) was amended in part as follows: (b) For Employees

who initially retired prior to October 1, 1998, Disqualifying Employment shall be defined as follows:

(1) Initially retired prior to the participant's 53rd birthday:

Disqualifying Employment in any capacity in the construction industry (either as a union or non-union construction worker).

12. Notification of the Plan amendments affecting Disqualifying Employment was sent to all retirees then in pay-status, including Heinz and Schmitt, by letter from the Affiant, dated July 22, 1998, and mailed by regular mail, postage prepaid, on or about that date. A copy of said letter is attached hereto as "Exhibit A-1".

13. Notification of the Plan amendments affecting Disqualifying Employment was sent to all participants and retirees, including Heinz and Schmitt, through the Fund's newsletter on or about August 14, 1998, a copy of which is attached hereto as "Exhibit A-2."

14. Subsequent to October 1, 1998, the Fund office was advised that Heinz was employed in a supervisory capacity by R. A. Cullinan & Son, Inc. of Tremont, Illinois; as a result, Heinz's pension benefits were suspended as of March 1, 1999.

15. Subsequent to October 1, 1998, the Fund office was advised that Schmitt was employed in a supervisory capacity by Seneca Petroleum Company of Peoria, Illinois; as a result, Schmitt's pension benefits were suspended as of February 1, 1999.

16. Both Heinz and Schmitt subsequently appealed their benefit suspensions to the Fund's Board of Trustees; both appeals were denied.

17. In addition to Heinz and Schmitt, five (5) other fund retirees had their benefits suspended after it was reported that

they worked as construction supervisors. Of these five(5), two (2) appealed their suspensions to the Board of Trustees and were also denied.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Barry C. McAnarney
BARRY C. MCANARNEY

Subscribed and sworn to before me this 6th day of February, 2000.

/s/ Melanie D. Brown
Notary Public

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

CAPTION OMITTED

AFFIDAVIT OF DAVID A. DEAN

I, DAVID A. DEAN ("Affiant"), hereby swear and depose under oath that I am an adult without disability and, if called upon to testify in the above-captioned cause, would and will testify truthfully as follows:

1. Affiant is and at all times relevant hereto was a Benefits Consultant and Actuary in the Chicago, Illinois, office of The Segal Company.

2. Affiant, an Enrolled Actuary and a member of The American Academy of Actuaries, has more than twenty (20) years of experience in the actuarial and consulting fields.

3. In his capacity as a Benefits Consultant and Actuary for The Segal Company, Affiant has worked since 1996 with Central Laborers' Pension Fund ("Fund"), a multi-employer pension fund with offices in Jacksonville, Illinois.

4. In the plan year ended September 30, 1996, the Fund experienced a net actuarial loss of approximately $30.2 million, primarily resulting from the high rates of retirement by plan participants at very early ages (i.e., earlier than 53).

5. In order to preserve the fiscal integrity of the Fund, The Segal Company, in the fall of 1997, among other things, recommended that the Fund adopt more restrictive "disqualifying employment" provisions so as to prevent "double dipping" by participants in the Fund, i.e., drawing a service pension (a Fund pension which commences prior to the attainment of normal retirement age) and thereafter continuing to work. The recommended disqualifying employment provisions were intended to discourage retirements at very early ages by further limiting re-employment after retirement.

6. Such very early retirements (i.e., prior to age 53) represent a significant actuarial cost to the Fund inasmuch as Plan benefits greatly exceed the contributions by the participants. Allowing a participant to "double dip" provides an unintended incentive to a participant to retire at a very early age, thereby resulting in excessive actuarial costs to the Fund.

7. On July 20, 1998, the Fund's Board of Trustees approved The Segal Company's recommendations to impose more restrictive disqualifying employment rules, effective October 1, 1998.

8. Affiant has apprised himself of all relevant data and criteria pertinent to determining the normal retirement age benefits of Plaintiff/claimant, RICHARD J. SCHMITT, JR., and Plaintiff/claimant THOMAS E. HEINZ with the Fund.

9. The relevant criteria for determining the normal retirement age benefits of a participant in the Central Laborers' Pension Fund are as follows: (a) date of birth; (b) first year in covered employment: (c) pension starting date; (d) normal retirement age; (e) lump sum value of normal retirement benefit commencing on normal retirement age; (f) monthly normal retirement benefit commencing on normal retirement age.

10. With respect to the actuarial calculations pertinent to both Plaintiffs' normal retirement benefits, the following actuarial assumptions have been made: actuarial equivalence as defined in Section 1.22 of Central Laborers' Pension Plan (a copy of which is attached hereto as "Exhibit B-1") using 6.07% interest and the 1983 Group Annuity Mortality Table

(50% Male/50% Female). Further, both Plaintiffs have elected monthly pension benefits for single life.

11. With regard to Plaintiff, RICHARD J. SCHMITT, JR., the data pertinent to said criteria are as follows:

(a) Date of birth	11/23/57
(b) First year in covered employment	1976
(c) Pension starting date	12/1/96
(d) Normal retirement age (age 65)	11/23/22
(e) Lump sum value of normal retirement benefit commencing on normal retirement age	$242,660.74[1]
(f) Monthly normal retirement benefit commencing on normal retirement age	$1,909.76[2]

12. With regard to Plaintiff THOMAS E. HEINZ the data pertinent to said criteria are as follows:

(a) Date of birth	6/2/56
(b) First year in covered employment	1975
(c) Pension starting date	1/1/96
(d) Normal retirement age (age 65)	6/2/21

[1] Lump sum value determined as of normal retirement age.

[2] This amount unreduced by Section 415 (I.R.C. Section 415) limitations, as it is expected the limits will not apply when the participant reaches his normal retirement age. Section 415 limits the amount of pension payments that can be paid from a pension plan. Further, this sum has been adjusted due to an early partial lump sum withdrawal by claimant and may be further adjusted to reflect any hours reported after pension starting date.

(e) Lump sum value of normal retirement benefit commencing on normal retirement age	$213,021.91[3]
(f) Monthly normal retirement benefit commencing on normal retirement age	$1,676.50[4]

Data regarding the suspension of the Plaintiffs' respective service pensions, and the fact that the Plaintiffs' respective service pensions were suspended, are wholly immaterial to the calculation of the normal retirement benefits (lump sum or monthly benefits) to which the respective Plaintiffs are entitled, and are likewise wholly immaterial to the calculation of the actuarial equivalence thereof.

14. The suspension of the Plaintiffs' respective service pensions has not reduced, terminated, or in any way affected, nor will it reduce, terminate, or in any way affect, the Plaintiffs' respective entitlement of normal retirement benefits (lump sum or monthly benefits) payable after attainment of normal retirement age, or the actuarial equivalence thereof.

AFFIANT FURTHER SAYETH NAUGHT

[3] Lump sum value determined as of normal retirement age.

[4] This amount unreduced by Section 415 (I.R.C. Section 415) limitations, as it is expected the limits will not apply when the participant reaches his normal retirement age. Section 415 limits the amount of pension payments that can be paid from a pension plan. Further, this sum has been adjusted due to an early partial lump sum withdrawal by claimant and may be further adjusted to reflect any hours reported after pension starting date.

/s/ David A. Dean
DAVID A. DEAN

SUBSCRIBED and SWORN to before me this 3rd day of February, 2000.

/s/ Michelle E. Clark
Notary Public

Supreme Court, U.S.
FILED
JAN 22 2004
OFFICE OF THE CLERK

No. 02-891

IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

ERISA Section 203(a)(3)(B) authorizes a pension plan to adopt a provision under which the "payment of benefits" shall be "suspended" during the period that a retiree returns to the workforce in certain capacities. 29 U.S.C. 1053(a)(3)(B). The statute does not limit this authorized suspension to only those benefits accrued (*i.e.*, earned by the participant) subsequent to the provision's adoption. ERISA Section 204(g), the "anti-cutback" rule, separately prohibits plan amendments that "decrease" previously accrued pension "benefits." 29 U.S.C. 1054(g).

The Question Presented is whether a pension plan amendment that is authorized by ERISA Section 203(a)(3)(B) is nonetheless prohibited by Section 204(g) to the extent that it applies to previously accrued benefits.

PARTIES TO THE PROCEEDINGS BELOW

All of the parties to the proceedings below are named in the caption. Petitioner Central Laborers' Pension Fund is a multiemployer employee benefit plan and trust and has no corporate affiliations.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW AND JURISDICTION

The district court's opinion granting petitioner judgment on the pleadings (Pet. App. 32a-45a) is unpublished. The opinion of the court of appeals reversing the district court (*id.* 3a-31a) is published at 302 F.3d 802. The court of appeals issued its opinion and order on September 13, 2002. This Court granted certiorari on December 1, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

ERISA Section 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B), provides in relevant part:

> (a) Nonforfeitability requirements. Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age * * *.
>
> * * * *
>
> (3) * * * (B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits –
>
> (i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.
>
> The Secretary [of Labor] shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed."

ERISA Section 204(g), 29 U.S.C. 1054(g), provides in relevant part:

> (g) Decrease of accrued benefits through amendment of plan.
>
> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or 4281.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner.

STATEMENT OF THE CASE

This is a case under the Employee Retirement Income Security Act (ERISA). Petitioner Central Laborers' Pension Fund administers a multiemployer pension plan (the Plan) governed by the statute. Respondents, who are each participants in the Plan, allege that an amended plan provision promulgated under ERISA Section 203(a)(3)(B) – which authorizes plans to adopt provisions under which "the payment of benefits is suspended" during the period that a retiree returns to the workforce in certain capacities – violates ERISA Section 204(g) (the anti-cutback rule). Rejecting both the regulatory guidance provided by the United States and the views of its sister circuits, a divided panel of the court of appeals agreed.

1. This case involves two provisions of ERISA that regulate participants' "benefits" and "benefit payments," terms that have distinct meanings under the statute. A pension "benefit" is a right, pursuant to the plan, to a stream of payments during the participant's lifetime. The benefit is not a guarantee that the participant will receive a minimum amount of money over the course of retirement, for the participant may die after 30 months or 30 years. See *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 894 (1996) ("ERISA 'leaves th[e] question' of the content of benefits 'to the private parties creating the plan.'" (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981))). See also *Alessi*, 451 U.S. at 514 (holding that under ERISA, "benefits [are] defined merely as those 'under the plan'" (citing 29 U.S.C. §§ 1002(22), (23))).

Respondents, for example, began receipt of "Service-Only Pensions" under the Plan when each was age 39. The monthly payments on this early retirement benefit are the same as on a full normal retirement pension, except that they start prior to normal retirement age. J.A. 34, 36, 38 (Plan §§ 1.14, 3.2, 3.14).[1] Participants qualify by accruing "30

---

[1] Because the benefit on a Service-Only Pension is not reduced to account for the fact that the participant is receiving benefit payments before normal retirement age, it is referred to as a "subsidized" benefit under ERISA. See *Mead Corp.* v. *Tilley*, 490 U.S. 714, 719 (1989) (detailing example of unsubsidized and subsidized pension benefit). Compare J.A. 37 (Plan § 3.6) (establishing "Early Retirement Pension," a second form of early retirement benefit offered by the Fund that, unlike the Service-Only Pension, is "unsubsidized" because it is reduced to account for the

Pension Credits or 30 Years of Vesting Service." *Id.* at 38 (Plan § 3.13). The Plan quantifies the benefit on a Service-Only Pension based on a formula embodied in a table set forth in the plan document that is based on standard actuarial assumptions. The table accounts for the participant's years of service and the anticipated lifespan of a person at normal retirement age. *Id.* at 57-62 (Plan § 3.4).

A "benefit payment" is a periodic amount payable to the retiree from the pension fund. The Plan in this case provides that a participant is entitled to a monthly benefit payment in the amount determined under the table. J.A. 57-62 (Plan § 3.4). See, *e.g.*, *Comm'r* v. *Keystone Consol. Indus.*, 508 U.S. 152, 154 (1993) ("A 'defined benefit pension plan,' as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment. The size of that payment usually depends upon prior salary and years of service."). For each of the respondents, the benefit computed under the Plan amounted to approximately $1650 a month, and upon their retirement each of the respondents began receiving monthly benefit payments in that amount from the Plan.

2. ERISA protects participants' benefits in rules governing "vesting" and "accrual." A plan "both must ensure nonforfeiture of all accrued benefits derived from employee contributions and must use vesting and accrual rates assuring portions of the benefits derived from the employer contributions should the employee leave the job before the normal retirement age." *Alessi*, 451 U.S. 513 n.10.

The vesting rules, principally including Section 203(a), 29 U.S.C. 1053(a), set forth the schedules and circumstances under which a participant's benefits must be "nonforfeitable" – *i.e.*, rules determining when the participant's "right" to

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early age at which benefits are claimed). The Plan defines normal retirement age as age 65 (or later under some circumstances). J.A. 34 (Plan § 1.14).

benefits must be "unconditional." § 3(19), 29 U.S.C. 1002(19). These rules provide participants with a legal assurance that benefits will be paid. Benefits attributable to the participant's own contributions are nonforfeitable immediately. § 203(a)(1), 29 U.S.C. 1053(a)(1). Benefits attributable to employer contributions vest on schedules set forth in the plan document that conform to restrictions set by the statute. § 203(a)(2), 29 U.S.C. 1053(a)(2).

Section 203(a)(3)(B) of ERISA furthermore permits plans to render forfeitable the benefits of a retiree who returns to the workforce. A plan may "provide[] that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits," under certain circumstances. In the case of a multiemployer plan, suspension may be triggered by employment "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." § 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii).[2] Once the participant leaves disqualifying employment, payments are restored and the participant's "benefit" remains the same as defined under the plan. 29 C.F.R. 2530.203-3(b)(2).

ERISA's separate accrual rules, set forth in Section 204, protect against the circumvention of the vesting rules. Among the accrual provisions is Section 204(g), which (with limited exceptions not relevant here) prohibits plan amendments that "decrease" previously accrued "benefits." 29 U.S.C. 1054(g). In 1984, Congress specified that this anti-cutback rule applies to early retirement benefits. An amendment that "has the effect" of "reducing an early

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[2] As explained by the accompanying regulations, this restriction applies to the suspension of normal retirement benefits and unsubsidized (*i.e.*, actuarially reduced) early retirement benefits; less rigorous standards apply to subsidized early retirement benefits. See 29 C.F.R. 2530.203-3(a). The distinction is immaterial in this case, however, because the Plan provision challenged by respondents tracks the restrictions of the statute.

retirement benefit * * * with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." § 204(g)(2), 29 U.S.C. 1054(g)(2).

3. Petitioner Central Laborers' Pension Fund (the Fund) administers a multiemployer pension plan subject to ERISA. Most participants in the Plan, including respondents Thomas E. Heinz and Richard J. Schmitt, Jr., are construction workers in central Illinois. At all times relevant to this case, the Plan has contained a disqualifying employment provision pursuant to Section 203(a)(3)(B) and its implementing regulations. See J.A. 42-48, 51, 55, 63-68, 71-77 (Plan § 6.7 (as amended)). This provision states that the Plan will "suspend" the payment of benefits to retirees who engage in "disqualifying employment." *Id.*

The Plan provides that it may be amended, and furthermore expressly states that the definition of "disqualifying employment" may be modified. See J.A. 23 (summary plan description noting power to amend), 46 ("If benefits have been suspended and payment resumed, new notification shall, upon resumption, be given to the Participant, if there has been any *material change* in the suspension rules or the identity of the industries or area covered by the Plan." (Plan § 6.7(d)(1)) (emphasis added)), 50 (amendment provision (Plan § 8.1)). See also *id.* at 64 (Plan § 6.7(e)(1)), 74 (Plan § 6.7(f)(1)). On that basis, the trustees have repeatedly amended the definition of "disqualifying employment" to account for current circumstances confronting the Plan. See, *e.g.*, *id.* at 42-43, 51, 63-64 (Plan § 6.7). For example, during a peak in regional demand for construction labor in 1994, the trustees adopted a less restrictive provision, pursuant to which the benefits of participants receiving a Service-Only Pension would not be suspended unless they worked more than 40 hours per month in disqualifying employment; previously, any amount of part- or full-time work had triggered suspension. See *id.* at 43.

After that amendment, the Plan's trustees were informed in 1997 that the Plan had suffered a $30 million net actuarial loss in one year, primarily due to the payment of Service-Only Pensions to participants aged 53 or younger. See *id.* at 79 (McAnarney Aff. ¶ 9); *id.* at 83 (Dean Aff. ¶ 6). The trustees responded by amending the Plan in several respects, including by adjusting the definition of disqualifying employment for persons who had retired before age 53 to eliminate the recently adopted 40-hour minimum and to include work as construction *supervisors*; previously, only construction *labor* had been included in the definition. See J.A. 63 (Plan § 6.7(b)(1)), 79 (McAnarney Aff. ¶ 10). That definition applies to benefits that had accrued prior to the amendment's adoption. *Id.* at 63.

Respondents stopped working as laborers in 1996 at the age of 39. They then applied for and began receiving Service-Only Pensions under the Plan. Both promptly took jobs in central Illinois as construction supervisors. Respondents' employment was not disqualifying under the Plan at the time of their original retirement. When the Plan's disqualifying employment provision was amended in 1998 to encompass supervisory work, the trustees notified respondents, both of whom chose to remain in their jobs. The Plan has suspended their benefit payments, citing their employment as construction supervisors.

4. Respondents brought this suit challenging the nation's pension plans' longstanding practice of applying amended employment disqualification provisions to previously accrued benefits. Respondents specifically contend that the 1998 Plan amendment that extended the definition of disqualifying employment to include construction supervisors (hereinafter "the Suspension Provision") is unlawful. Respondents do not claim that the Suspension Provision violates Section 203(a)(3)(B). Nor do they contend that the Suspension Provision violates the terms of the Plan or the trustees'

obligations under ERISA to act as fiduciaries for both the Plan's participants and beneficiaries.[3]

Respondents instead assert that, because their pension benefits had already accrued when the Suspension Provision was adopted, that plan amendment "decreased" their Service-Only Pensions in violation of ERISA's anti-cutback rule. But in making that claim, respondents do not directly challenge the withholding of their monthly checks. Furthermore, respondents do not dispute that their benefits will be paid in the same monthly amount as defined under the Plan as soon as respondents elect to leave disqualifying employment. Respondents nevertheless contend that the mere *adoption* of the Suspension Provision added a "condition" – *i.e.*, a restriction on receiving retirement benefit payments while simultaneously working as construction supervisors – that effectively "decreased" their Service-Only Pensions.

a. The district court rejected respondents' argument, granting the Fund judgment on the pleadings. See Pet. App. 32a-45a. The court agreed with the Fifth Circuit's holding in *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (1998), that an otherwise lawful plan amendment relating to disqualifying employment does not violate Section 204(g). Pet. App. 37a. The Fifth Circuit in *Spacek*, after carefully examining the statutory language and the guidance provided by the government, concluded that Section 203(a)(3)(B) "authorizes the very type of amendment at issue in this case, and * * * § [204](g) in no way limits this authorization." *Spacek*, 134 F.3d at 290.

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[3] The Suspension Provision applies to work with an employer in any capacity in the construction industry. J.A. 63 (Plan § 6.7(b)(1)). Respondents contended below that the trustees' interpretation of this provision to include their supervisory work was "arbitrary and capricious." The district court rejected that argument. Pet. App. 45a. Because the court of appeals did not reach the question, it is not presented in this Court.

b. A divided panel of the Seventh Circuit reversed the district court. The majority apparently recognized that, in withholding monthly payments from respondents, the Plan had "suspended" their "benefit payments" and had not "decreased" their "benefits." See Pet. App. 14a, 15a, 20a. But it "reject[ed]" the view – adopted by the Fifth Circuit in *Spacek* as well as the Sixth Circuit in *Whisman* v. *Robbins*, 55 F.3d 1140 (1995) – that an amended employment disqualification provision that comports with ERISA Section 203(a)(3)(B) does not violate Section 204(g). Pet. App. 3a, 4a.

The majority instead agreed with respondents that Section 204(g) implicitly forbids every plan amendment that places material conditions on the payment of previously accrued benefits, including conditions authorizing the suspension of benefit payments as provided by Section 203(a)(3)(B). "A participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit 'reduces' the benefit just as surely as a decrease in the size of the monthly benefit payment." Pet. App. 9a. On this view, "it is *not the suspension* of benefit payments that offends the anti-cutback rule, *but the change* (to the detriment of the participant) *in the conditions* triggering the suspension." *Id.* at 15a (emphases added). According to the court, at the time of their "retirement," respondents "had the right under the plan to work as construction supervisors and continue to receive their monthly benefit payments." *Id.* at 8a. Thus, respondents' "loss of the option of working as construction supervisors was a reduction of their early retirement benefits." *Id.* at 9a.

On that basis, the majority deemed it immaterial that the Plan had only "suspended" respondents' "benefit payments" rather than "decreasing" their "benefits." Instead, the Seventh Circuit found it dispositive that respondents lost the suspended payments forever. "Although with a suspension the interruption in benefit payments is temporary, the retiree

never recovers the payments lost during the employment period. The amendment thus 'eliminates' monthly benefit payments for participants who take certain jobs after retirement and 'reduces' the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues." Pet. App. 10a.

Judge Cudahy dissented. See Pet. App. 24a-31a. He viewed the Fifth Circuit's reasoning in *Spacek*, like that of the Sixth Circuit in *Whisman*, as "straightforward," in contrast to the panel majority's "sometimes tortured contentions" and "implausible and unconvincing arguments that do violence to the clear intent of the drafters." *Id.* at 24a, 31a. Judge Cudahy explained that the Plan's position was supported by ERISA's "plain meaning," given the many statutory provisions that treat an authorized "suspension" of benefit payments as distinct from a prohibited decrease in benefits. *Id.* at 24a. The participants' loss of suspended payments is "acceptable if they withdraw from retirement and return to the workforce, later to place additional demands upon the plan. They suffer no loss of regular income and are merely deprived of a bonus in the form of a dual recovery at the expense of the construction industry. Meanwhile, the financial integrity of the plan may be affected by continuing to make retirement provisions for participants who have not really retired." *Id.* at 31a (Cudahy, J., dissenting). That conclusion was confirmed by the legislative history, including the statement by the principal sponsor of the 1984 statutory amendment (which extended Section 204(g) to early retirement benefits) that the amendment was not "intended to apply to benefit changes authorized by existing law," "including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits." 130 Cong. Rec. 23,487 (1984) (statement of Rep. Clay). See Pet App. 15a-16a.

5. This Court subsequently granted certiorari (124 S. Ct. 803 (2003)), consistent with the recommendation of the Solicitor General on behalf of the United States, which had

expressed the view in an invited *amicus* brief that "[t]he court of appeals erred in concluding that a 'suspension' of the payment of early retirement benefits that results from an amendment to the post-retirement 'disqualifying employment' provision of the plan is a 'reduction' of plan benefits for the employees who retired before adoption of the amendment and is therefore prohibited under the anti-cutback rule of Section 204(g) of ERISA." U.S. Cert. *Amicus* Br. 5.

SUMMARY OF ARGUMENT

I. Congress has assigned the Secretary of Labor and the Secretary of the Treasury the responsibility to implement ERISA's comprehensive and reticulated provisions. Those regulatory authorities have determined that the right conferred by ERISA to temporarily suspend the benefit payments of a participant who returns to the workforce extends to all of the participant's retirement benefits, not merely to those benefits that accrue subsequent to the provision's adoption. For decades, the nation's pension plans have relied on that guidance in adjusting their employment disqualification provisions to account for present labor conditions and economic circumstances. The view of the ERISA regulatory authorities is correct, and respondents' attempt to impose broad retroactive liability on pension plans should be rejected.

ERISA Section 203(a)(3)(B) authorizes pension plans to adopt provisions under which the payment of benefits to a participant is temporarily suspended in a single circumstance: during "such period as the employee is employed, subsequent to the commencement of payment of such benefits," in certain capacities that are spelled out in the statute and its implementing regulations. Respondents do not dispute that the plan provision they challenge complies fully with this unambiguous authority, which contains no hint of the limitation they propose.

The government's view that Section 203(a)(3)(B) applies fully to previously accrued benefits also comports with Congress's understanding and its expression of the statute's

purpose. Although ERISA protects participants' expectations that their accrued benefits will be paid, the very purpose of Section 203(a) – which addresses the vesting of participants' rights – is to specify what expectations are reasonable. In Section 203(a)(3)(B), Congress did so, while protecting the interests of participants in several ways: by placing the prospect of suspension completely within the control of the participant, who decides whether and when to rejoin the workforce, as well as whether and when to return to retirement; by specifying the forms of employment to which disqualification attaches; by forbidding the forfeiture of benefits attributable to the employee's own contributions (as opposed to the employer's contributions); and by providing that the plan may only suspend benefit payments for the period of re-employment rather than reducing the participant's benefits.

Contrary to the Seventh Circuit's view, ERISA does not implicitly confer on participants any broader "right" to work after retirement, much less a right that trumps an otherwise lawful employment disqualification provision. Congress expressed no special solicitude for persons who return to work after retirement, and who thereby secure a further income and potentially a further pension.

Section 203(a)(3)(B) can accomplish Congress's objectives only if the suspension of benefits extends to previously accrued benefits. The purpose of an employment disqualification provision is to respond to present (and oftentimes changing) circumstances, particularly including shifts in labor markets and the plan's current financial health. For example, plans loosen restrictions on re-employment when there is a greater need for labor, and tighten restrictions when jobs are in short supply such that employment of retirees (subsidized by their pensions) would undercut workers who may not yet be eligible for retirement. A plan provision that applied only to benefits that accrue in the future would have no effect on the conduct of participants already in

retirement and thus would utterly fail in fulfilling these objectives.

Respondents' reading would therefore disadvantage plans and participants in a way that Congress could not have intended. If prohibited by Section 204(g) from amending their employment disqualification provisions to impose further restrictions on re-employment, plans will simply adopt the most stringent provisions permitted by the statute from the outset.

II. Just as the Secretaries of Labor and the Treasury have determined that the power conferred by Section 203(a)(3)(B) extends to benefits that accrued prior to the adoption of a suspension provision, so too those regulatory authorities have determined that the "anti-cutback" rule of Section 204(g) does not call for a contrary result. That conclusion is sound as well.

Section 204(g) forbids plan amendments that "decrease" previously accrued "benefits." The Seventh Circuit essentially acknowledged that the "suspension" of "benefit payments" under Section 203(a)(3)(B) does not "decrease" a participant's "benefits" as those terms are used in ERISA. A suspension is the withholding of particular payments, whereas a decrease is a reduction of the benefit amount identified by the formula under the plan. In this case, when respondents elected to continue to work as construction supervisors despite the terms of the Suspension Provision, the Plan suspended their monthly benefit payments. But respondents' "benefits" remain the same as when they originally retired and will be paid at the same monthly rate when they elect to leave disqualifying employment.

If Congress had intended to adopt the rule that respondents propose, it could have and would have specified in Section 204(g) that a plan may not adopt an amendment that suspends payments on previously accrued benefits. Its failure to do so is telling, for the distinction between a

prohibited decrease and an authorized suspension is well established by other provisions of ERISA.

That conclusion is buttressed by ERISA's drafting history and the statute's legislative history. The provisions that became Sections 203(a)(3)(B) and 204(g) were added to the same section of the draft bill simultaneously. Yet nothing in the legislative history suggests that Congress intended the latter to limit the reach of the former. Similarly, the legislative history of the 1984 amendment to ERISA specifying that Section 204(g) applies to early retirement benefits indicates that Congress did not intend to modify the vesting rules established in Section 203(a).

The Seventh Circuit's contrary arguments are unavailing. The theory of the majority below was that a plan's adoption of an employment disqualification provision adds a new "condition" on participants' benefits in violation of Section 204(g). But such a condition applies to the participant's post-retirement employment, which is not a "benefit" protected by either ERISA or the Plan, and which, *ipso facto*, is not a "benefit" that can be "decreased" in violation of the anti-cutback rule. Beyond that, the court of appeals' reasoning fails for the reason that a "condition" imposed by an employment disqualification provision is expressly authorized by ERISA's vesting rules. Section 203(a)(3)(B) is one of the provisions under which a plan is authorized to depart from the general rule that participants' accrued benefits must be "unconditional." § 3(19), 29 U.S.C. 1002(19).

The judgment of the Seventh Circuit accordingly should be reversed.

ARGUMENT

A PLAN AMENDMENT THAT, CONSISTENT WITH ERISA SECTION 203(A)(3)(B), AUTHORIZES A PENSION PLAN TO "SUSPEND" A PARTICIPANT'S "BENEFIT PAYMENTS" DURING THE PERIOD HE ENGAGES IN CERTAIN EMPLOYMENT DOES NOT

"DECREASE" THE PARTICIPANT'S "BENEFITS" IN VIOLATION OF ERISA SECTION 204(G).

In Section 203(a) of ERISA, Congress expressly authorized pension plans to adopt plan provisions that temporarily "suspend" the "payment of benefits" in one carefully delimited situation: when a retiree returns to the workforce in disqualifying employment. § 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B). The ERISA regulatory authorities – the Secretaries of Labor and the Treasury – have correctly recognized that this authorization extends equally to provisions that apply to the payment of benefits which have previously accrued as well as to provisions governing subsequently accrued benefits. And the ERISA regulatory authorities have also correctly recognized that ERISA Section 204(g) – the "anti-cutback" rule – does not override the Section 203(a)(3)(B) authorization.

In reliance on that clear guidance from the government, as well as on two courts of appeals decisions adopting the government's position, the nation's pension plans have for decades amended their provisions governing disqualifying employment on an ongoing basis to take account of the current circumstances in the local labor market and in the plan's financial health. Respondents contend that the many pension plan amendments increasing the scope of disqualifying employment adopted over the past decades are illegal. Respondents' argument would not only bar these provisions from operating with respect to current retirees and non-retirees who have previously accrued benefits, but would also put plans containing such provisions at risk of losing their tax-exempt status. See 26 U.S.C. 411(d)(6) (parallel provision to Section 204(g) providing that a pension plan is not a qualified plan if an amendment decreases benefits in violation of the anti-cutback rule); *id.* 401(a)(7) (providing that a plan is not qualified for tax-exempt status unless it complies with Section 411). There is no legitimate basis for imposing such broad retroactive liability on the nation's pension plans, their participants, and contributing employers.

I. ERISA Section 203(a)(3)(B) Authorizes Pension Plans To Adopt Employment Disqualification Provisions That Apply To Pension Benefits Which Accrued Prior To The Adoption Of The Provisions.

Section 203(a)(3)(B) of ERISA addresses the suspension of the payment of pension benefits during periods of disqualifying employment. That provision is among the statutory "vesting" rules – the rules delimiting the pension benefits which, once promised and earned, the plan has a legal obligation to pay and which the participant has a legal right to receive. These vesting rules effectuate the purpose of assuring that the plan will provide retirees the retirement income they have been promised. See *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980).

Section 203(a) contains several provisions specifying circumstances in which, notwithstanding the general vesting rules, a plan is not obligated to pay benefits. Section 203(a)(3)(B), in particular, authorizes pension plans to withhold participants' benefit payments; that is, it authorizes a plan to "suspend[]" the "payment of benefits" attributable to employer contributions during the period that a retiree returns to the workforce in certain capacities.

This case turns on the scope of the authority conferred by Section 203(a)(3)(B). Respondents contend – and the Seventh Circuit concluded – that the statute merely authorizes plans to provide for the suspension of the payment of those benefits that accrue *after* the disqualifying employment provision is adopted. By contrast, the regulatory guidance issued by the ERISA regulatory authorities has consistently reflected their understanding that Section 203(a)(3)(B) authorizes plans to adopt provisions that apply to payments with respect to the *entire* benefit – both the portion that has accrued prior to, and the portion to be accrued after, the adoption of the suspension provision. This construction of Section 203(a) is entirely sound.

1. Section 203(a)(3)(B) states that a plan may "provide[] that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payments of such benefits," in certain capacities. For multiemployer plans, suspension may be triggered by work "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." § 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii). See *supra* at 5 n.2. ERISA on its face thus permits plans to suspend the payment of *all* benefits derived from employer contributions. There is simply no language whatsoever suggesting that, as respondents contend, suspension must be limited to those benefits that accrue after the adoption of a plan provision addressing employment disqualification. "To change the rules governing suspensions is merely to create a suspension with a little different design than an earlier one. The rules addressing the consequences of invoking a suspension necessarily encompass changes leading to a new form of suspension." Pet. App. 30a (Cudahy, J., dissenting).

Congress was well aware of how to restrict plan amendments relating to vesting. Section 203(c), for example, provides that "[a] plan amendment changing any vesting schedule under the plan" is impermissible if it decreases "the nonforfeitable percentage of the accrued benefit derived from employer contributions" or if participants with at least three years of service are not permitted "to elect" to vest under the old schedule. § 203(c), 29 U.S.C. 1053(c). But Congress imposed no such restriction in Section 203(a)(3)(B).

The governing regulations, like the statutory text, accordingly provide that plan provisions relating to the suspension of benefits may apply to previously accrued benefits. The Department of Labor, which "shares enforcement responsibility for ERISA with the Department of the Treasury" (see *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 107 n.14 (1993)), issued regulations implementing Section 203(a)(3)(B) more than two decades ago. The regulations authorize plans, without

qualification or limitation, to 'provide[] that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits." See 29 C.F.R. 2530.203-3(a). The Secretary of the Treasury, in turn, has adopted the Department of Labor regulations for purposes of the provision of the Internal Revenue Code (26 U.S.C. 411(d)(6)) that parallels Section 203(a)(3)(B). See 26 C.F.R. 1.411(a)-4(b)(2). On that basis, the IRS has "consistently approved plan amendments that have provided for the suspension of post-retirement benefits under employment disqualification provisions that conform to Section 203(a)(3)(B)." U.S. Cert. *Amicus* Br. 13-14.

2. The ERISA regulatory authorities' construction of Section 203(a)(3)(B) is consistent not only with the statutory text, but with the provision's purpose.

Contrary to the Seventh Circuit's decision, ERISA does not generate and does not protect a participant's "expectation" that he will always be paid retirement benefits while engaging in further employment that provides not only extra income but also potentially earns him a second pension. To the contrary, the statute makes it plain that ERISA does *not* assure the payment of benefits to retirees who re-enter the workforce in certain capacities.

ERISA does so through Section 203(a)(3)(B), which authorizes multiemployer plans to define disqualifying employment to include any work "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." § 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii). Given that authorization, the fact that the plan broadens its disqualification provision from *some* such work to *all* such work after a participant's benefits have accrued disturbs no expectation generated by ERISA and no right protected by ERISA.

There is nothing in the statute or its legislative history suggesting a congressional intent to create or protect a right of "retirees" to work post-retirement in particular job capacities

while being paid retirement benefits. To the contrary, the very enactment of the disqualification provisions of Section 203(a)(3)(B) signifies that Congress determined that retirees who take disqualifying employment have the weakest of claims to the plan's assets.[4]

Although Section 203(a)(3)(B) tempers participants' expectations regarding the receipt of benefit payments during periods of re-employment, it bears emphasizing that the statute does so in a measured manner. Most fundamentally, the participant has *complete* control over whether disqualification occurs and, if it does occur, he has *complete* control over how long disqualification lasts. The plan must make payments to a participant who retires unless and until that participant elects to leave retirement, and the participant is always able to secure restored pension payments. While "ERISA was designed to protect working people in their retirement pension rights," those rights "are protected" during the period in which benefits are suspended pursuant to Section 203(a)(3)(B) because "retirement payments are in suspension only until he actually retires." *Thompson* v. *Asbestos Workers Local No. 53 Pension Fund*, 716 F.2d 340, 342 (CA5 1983). As respondents freely concede, "Even under the amended version of the plan at issue in this litigation, Messrs. Heinz and Schmitt are entitled to receive their pensions * * * merely by choosing to stop working altogether, or even simply by going to work in an unrelated industry." BIO 14 n.10.

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[4] Nor did the Plan itself confer on participants a "right" to work in any particular capacity after "retirement." To the extent the Plan addresses the issue at all, it defines respondents' Service-Only Pension in dollar terms (as opposed to a limited number of conditions on benefit payments), provides that the Plan's provisions may be amended in the future, and specifically contemplates that amendments to the disqualification provisions would apply to participants who had previously retired. See *supra* at 6.

Further, the scope of disqualifying employment is circumscribed. In order to avoid "forcing pension-age workers into complete retirement, Congress limited permissible suspensions [of normal retirement benefits] to those imposed only while the otherwise eligible plan member remained employed in the same industry, same trade, and same geographic area covered by his plan." *Smith* v. *CMTA-IAM Pension Trust*, 654 F.2d 650, 658 n.9 (CA9 1981). The plan provision challenged by respondent, for example, is triggered by re-employment in the construction trade in central Illinois. See J.A. 63 (Plan § 6.7(b)(1)), 32 & 56 (Plan § 1.6 (definition of Employer)).

Section 203(a)(3)(B) moreover strictly circumscribes the actions a plan may take even if a participant engages in disqualifying employment. The plan may only temporarily "suspend" the participant's "benefit payments." Section 203(a)(3)(B) does not authorize the plan to redefine the amount of the benefit that the plan has a continuing legal obligation to pay. The only authority is to withhold particular payments while the retiree remains in disqualifying employment; the plan may not reduce or eliminate the benefit to which the participant is entitled after the period of suspension ends. In addition, benefits derived from the participant's own contributions to the pension plan are inviolate, even upon the participant's return to the workforce. See § 203(a)(1), 29 U.S.C. 1053(a)(1).[5] And suspension of benefits is forbidden under any circumstance for participants who reach their "required beginning date" as that term is defined in the Internal Revenue Code, which generally is 70 1/2. See 26 U.S.C. 401(a)(9)(C).[6]

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[5] In this case, all of respondents' benefits are derived entirely from contributions by their employers.

[6] There is also considerable protection afforded to participants by "the formal procedures set forth in the plan" to adopt amendments. *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 516 (1997); *ibid.* (in amendment, plan is forbidden "to 'discharge, fine, suspend, expel, discipline, or discriminate against' the plan's participants and beneficiaries 'for the purpose of interfering with [their] attainment of * * * rights * * * under the plan'" (alterations in original)). Amendments are furthermore only adopted upon approval by the board of trustees, which in the case of a multiemployer plan is composed equally of representatives of management and labor. 29 U.S.C. 186(c)(5)(B).

3. Equally to the point, the ERISA regulatory authorities' construction of Section 203(a)(3)(B) is sound because it effectuates Congress's purpose to authorize plans to calibrate their employment disqualification provisions to the changing labor markets and economic circumstances confronting them at any particular moment in order to further the interests of all their participants. A plan can only adapt effectively to changing conditions through disqualification provisions that encompass *all* benefits, not merely those benefits that would accrue subsequent to the adoption of an amended disqualification provision. The Seventh Circuit is entirely mistaken in its conjecture that it is sufficient to accomplish the purposes of Section 203(a)(3)(B) that "the anti-cutback rule does not prohibit the Fund from curbing certain reemployment prospectively, that is, by using the new definition of disqualifying employment to suspend the portion of the benefit payment attributable to service after the amendment." Pet. App. 10-11a n.6.

Plans constantly confront diverse and changing circumstances that necessitate modifying the scope of "disqualifying employment." As described by ERISA's principal sponsor in the House of Representatives, individual plans' definitions of disqualifying employment would need to be adjusted to account for "the particular facts and circumstances of the industry; the objectives of industrial stability; the conditions of employment and earnings in the industry; the benefit payment period of the plan; and the burden of onerous and costly administrative procedures

imposed upon the plan by these provisions." 3 ERISA, Legislative History of the Employee Retirement Income Security Act, 1974, at 4669-70 (statement of Rep. Dent) [hereinafter ERISA Legis. Hist.]. The point is illustrated by *Johnson* v. *Franco*, 727 F.2d 442 (CA5 1984). There, the court of appeals recognized that:

> the initial more stringent limitations upon any maritime employment arose in an effort to assure that those who collected benefits were really retired from the maritime industry and thus in need of the benefits, that the more liberalized later restrictions were designed to encourage more senior [union] members to retire and to create openings in union jobs for other younger [union] members who faced unemployment in changing economic conditions, and that some of the restrictions (later abandoned) for employment on American flag and [union]-contract vessels were designed to ensure that maritime employers contributing to the [union] plan did not simultaneously pay the same person both a union pension (through their contributions to the pension fund) and a salary while he was working.

Id. at 447-48.

Pension plans thus confront the ongoing task of facilitating the ability of their participants to find work and the ability of employers to find workers. These concerns are particularly relevant for multiemployer plans, like the Plan in this case, which often include participants from many employers in a single trade and geographic region. Multiemployer plans are also common in industries characterized by irregular employment or frequent shifts of workers between employers (which are often small in size and which are consequently more vulnerable to the cyclical nature of the economy). See JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYMENT BENEFIT LAW 62-63 (3d ed. 2000) (citing EMPLOYEE BENEFIT RESEARCH INST., FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-59 (3d

ed. 1987)). See also § 3(37), 29 U.S.C. 1002(37) (defining a multiemployer plan as one "maintained pursuant to one or more collective bargaining agreements * * * to which more than one employer is required to contribute").

Pension plans therefore regularly modify their employment disqualification provisions in response to short-term changes in labor markets. When employers are in need of workers, plans loosen disqualification restrictions on re-employment in order to encourage broader participation in the workforce. By limiting the suspension of benefit payments for participants who have already entered early retirement, plans create financial incentives for experienced and skilled workers to fill gaps in the job market. In this case, for example, as noted *supra* at 6, in 1994 the Fund's trustees responded to a peak in demand for construction labor in central Illinois by amending the Plan to provide that participants receiving a Service-Only Pension would not have their benefit payments suspended unless they worked 40 hours or more in a month in disqualifying employment; before that amendment, any number of hours of such employment triggered a suspension. See J.A. 43 (Plan § 6.7(a)(2)).

Conversely, at the point that job markets shift and become tight such that jobs are scarce, plans tighten the rules for permitted re-employment of retirees (who could otherwise accept lower wages because they are receiving pension benefits) to limit the extent to which they compete against other non-retired plan participants for jobs. Thus, a principal purpose of Section 203(a)(3)(B) is to authorize pension plans, in times of tight job markets, "to protect participants against their pension plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of[,] employees covered by the plan." 3 ERISA Legis. Hist. at 4738 (statement of Sen. Williams). See also 3 ERISA Legis. Hist. at 4772 (statement of Sen. Javits) (Congress intended to "protect unions against undercutting of wage scales and the

additional expense generated by the need to subsidize retirement benefits for those who have left the work force as well as retirement benefits for those continuing to work."); *Atkinson* v. *Sheet Metal Workers' Trust Funds*, 833 F.2d 864, 865 (CA9 1987) (Section 203(a)(3)(B) "protects the trust by preventing individuals from collecting pensions while they compete with those who are contributing to the fund"); *Riley* v. *MEBA Pension Trust*, 570 F.2d 406, 410 (CA2 1977).

The distribution of benefit payments also bears a direct relationship to a pension fund's financial health, which can vary considerably depending on both local and national economic conditions. In good times, the plan can afford to be more generous in paying retirement benefits. But in times of stringency, the suspension of benefit payments to retirees who are presently earning separate incomes from post-retirement employment is a valuable means of preserving the fund's assets. "The suspension of benefits to a retiree is a common device to maximize the assets of a pension fund by limiting such payments to those who are fully retired." *Bayles* v. *Cent. States, S.E. & S.W. Area Pension Fund*, 462 F. Supp. 102, 107 (N.D. Miss. 1978). See also *Pete* v. *United Mine Workers of Am.*, No. 1953-69, 1976 U.S. Dist. LEXIS 15,998, at *6 (D.D.C. 1976) ("By denying benefits to class members who have found post-denial employment, the Trustees in effect recognize that the Fund resources can better be used to benefit other eligible pensioners without employment."). "Because suspensions do not decrease accrued benefits, ERISA allows plan administrators more flexibility in adjusting the provisions for suspensions to maintain the financial integrity of pension plans." Pet. App. 28a n.2 (Cudahy, J., dissenting) (internal citation omitted). In harder economic times, Section 203(a)(3)(B) not only furthers the interests of all participants by ensuring that the fund's assets can be directed principally to retirees who are not receiving additional incomes, it also "protect[s] the fiscal integrity of the fund" "by preventing eligible employees from accepting a pension and going to work in the same occupation in the area

covered by the plan." *Dennis* v. *Bd. of Trustees*, 620 F. Supp. 572, 575 (M.D. Pa. 1985).

In circumstances like these, involving "conflicting obligations of the trustees to preserve the financial security of a pension fund and yet apply the assets to the greatest possible advantage for the beneficiaries," Congress recognized that "restricting the amounts paid to some may be necessary to prevent loss to others." *Geib* v. *N.Y. State Teamsters Conference Pension & Ret. Fund*, 758 F.2d 973, 978 (CA3 1985). Indeed, suspending the benefit payments of such retirees makes it unnecessary to secure excess funding that will otherwise "have to come largely from the stepped-up contributions of current participants." *Harm* v. *Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (CA9 1983). Cf. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981) (among declared policy considerations of ERISA, in general, and the Multiemployer Pension Plan Amendments Act of 1980, in particular, is the "financial stability of multiemployer pension plans").

If the Seventh Circuit is correct that ERISA permits plans to suspend only "the portion of the benefit payment attributable to service after the amendment" (Pet. App. 10a n.6), the authority that Section 203(a)(3)(B) confers on plans to adjust to the current state of labor markets and present economic conditions would be rendered essentially nugatory. By definition, a plan can alter the incentives of a participant to *return* to the workforce only if that participant has already accrued retirement benefits and retired. Similarly, trustees cannot employ the tool of employment disqualification to adjust financial outlays to account for a plan's current financial health if the terms of any plan amendment apply only to benefits that accrue later and thus will not be paid until well in the future.

As a result, although invalidation of the Suspension Provision would benefit respondents personally, the great majority of participants in this and other plans would

inevitably be disadvantaged by the rule that respondents advocate. The participants harmed as a result would moreover be those who, unlike respondents, do not have the security of a post-retirement salary. When employment is hard to find, fewer jobs would be available to those non-retired workers. Trustees prohibited from adopting effective disqualifying employment provisions that apply to all benefits would also have to find other means of protecting the plan's assets. In petitioner's experience, trustees would respond by reducing costs, including by reducing future benefit accrual rates for active participants or reducing or eliminating benefit enhancements that would otherwise counteract cost of living increases for retirees. At the very least, if trustees are forbidden from adapting disqualifying employment provisions to changing circumstances, they would have no prudent choice but to adopt the strictest rule permitted by law from the outset in order to protect the plan's assets and to serve the interests of retirees who are dependent on their benefit payments. It is exceedingly unlikely that Congress intended to force that result.

II. The Court of Appeals Erred In Extending Section 204(g)'s Prohibition On Plan Amendments That "Decrease" Participants' "Benefits" To Forbid The "Suspension" Of "Benefit Payments" Expressly Authorized By Section 203(a)(3)(B).

The anti-cutback rule of ERISA Section 204(g) prohibits a plan amendment that "decrease[s]" previously accrued benefits, including if the amendment "has the effect" of "reducing an early retirement benefit." 29 U.S.C. 1054(g). Just as the ERISA regulatory authorities have concluded that Section 203(a)(3)(B) authorizes a plan to adopt an amended employment disqualification provision that suspends the payment of *all* benefits – including those accrued prior to the provision's adoption – so too the ERISA authorities have specifically determined that such a provision does not violate the anti-cutback rule. The view of the government is that

"[w]hile the anti-cutback rule of Section 204(g) expressly prohibits a decrease of an accrued benefit, it does not purport to prohibit a suspension of benefit payments that is authorized under other provisions of the statute. In particular, the anti-cutback rule does not prohibit the suspension of the payment of retirement benefits authorized by Section 203(a) of ERISA." U.S. Cert. *Amicus* Br. 8.

Consistent with the regulations issued by both the Secretary of Labor and the Secretary of the Treasury under Section 203(a)(3)(B) (see *supra* at 17-18), the IRS regulations thus provide that a plan's suspension of benefit payments pursuant to Section 203(a)(3)(B) does not decrease a participant's "accrued benefits" for purposes of ERISA's anti-cutback rule. See 26 C.F.R. 1.411(c)-1(f) ("No adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B)."). The governing IRS Manual accordingly states in definite terms: "An amendment that reduces IRC 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate IRC 411(d)(6)." IRS Multiemployer Plan Examination Guidelines § 4.72.14.3.5.3(7) (May 4, 2001).[7] This interpretation is entitled to deference, and it is clearly a permissible reading, to say the least, of the ERISA provisions. See *Alaska Dep't of Env'tl Conserv.* v. *EPA*, __ U.S. __, No. 02-658 (Jan. 21, 2004) (holding that "cogent administrative interpretations" not meeting the formal criteria

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[7] The Seventh Circuit mistakenly thought its position was consistent with a different IRS regulation, 26 C.F.R. 1.411(d)-4, which in "Q&A-7" states that a plan amendment violates the anti-cutback rule if it adds a new "condition" to a "protected" benefit. As the United States has explained, that regulation does not apply in this circumstance, for the IRS distinguishes payments that are suspended under Section 203(a) from a "protected benefit." U.S. Cert. *Amicus* Br. 13. In any event, the regulation does not purport to apply to conditions that Congress expressly authorized in ERISA Section 203(a).

for *Chevron* deference nonetheless "warrant respect" and that "particular deference" is owed to "an agency interpretation of longstanding duration," and then assessing whether such an interpretation contained in an internal agency memorandum must be "reject[ed] as impermissible").

That conclusion is sound, and the contrary reading of respondents and the Seventh Circuit should be rejected.

1. There is first of all the matter of Section 204(g)'s literal language. On its face, that provision of ERISA regulates amendments that decrease benefits, terminology that (as neither respondents nor the Seventh Circuit dispute) refers to amendments that modify the defined periodic benefit the plan is legally obliged to pay. All would thus agree that petitioner could not adopt a plan amendment that changed respondents' benefits (which had already accrued at the time the Suspension Provision was adopted) from, for example, $1650 to $1450 per month.

But such a prohibited amendment stands in contradistinction to one that merely provides for the temporary suspension of the payment of benefits. Nothing in Section 204(g) states an anti-cutback rule prohibiting plan amendments providing for such a suspension. Section 204(g) is triggered by "a reduction or elimination of accrued benefits and retirement-type subsidies, not a suspension, as is the case here." *Whisman* v. *Robbins*, 55 F.3d 1140, 1147 (CA6 1995). Although respondents' benefit payments are presently "suspended" because they have elected to engage in disqualifying employment, their defined "benefit" of approximately $1650 a month remains the same: when they elect to leave disqualifying employment, the suspension will end and their benefits will be paid at the level defined by the Plan and paid prior to the period of suspension.

This Court has repeatedly recognized that, because "ERISA is a 'comprehensive and reticulated statute,' and is 'enormously complex and detailed,' it should not be supplemented by extratextual" inferences of congressional

intent. *Hughes Aircraft Co.* v. *Jacobsen*, 525 U.S. 432, 447 (1999) (quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 339, 361 (1980); *Mertens* v. *Hewitt Assoc.*, 508 U.S. 248, 262 (1993)). In the context of this case, that settled principle compels the conclusion that Congress, in prohibiting a plan amendment that "decreases" benefits, did not impliedly intend to limit the authority it had separately conferred in Section 203(a)(3)(B) to adopt provisions relating to the "suspension" of benefits during periods of disqualifying employment.[8]

2. The majority below did "not view the omission of a specific reference to suspensions in the anti-cutback rule as an oversight, but as unnecessary." Pet. App. 15a. In reality, if Congress had intended to render participants' benefits not merely *protected* by the limitations on suspension set by Section 203(a)(3)(B) but *inviolate*, it could have done so explicitly in several ways. It could have prohibited in Section 203(a)(3)(B) the adoption of employment disqualification provisions that apply to previously accrued benefits. Alternatively, Congress could have provided that the anti-cutback rule of Section 204(g) applies not merely to

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[8] See, *e.g.*, *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997) ("Had Congress intended to confine [ERISA] § 510's protection to 'vested' rights, it could have easily substituted the term 'pension plan,' for 'plan,' or the term 'nonforfeitable' right, for 'any right.'" (internal citations omitted)); *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 892-93 (1996) ("[ERISA] Section 406(a)(1)(D) does not in direct terms include the payment of benefits by a plan administrator. And the surrounding provisions suggest that the payment of benefits is in fact not a 'transaction' in the sense that Congress used that term in § 406(a)."); *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 8 (1987) ("The words 'benefit' and 'plan' are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. Given the basic difference between a 'benefit' and a 'plan,' Congress' choice of language is significant in its pre-emption of only the latter.").

amendments that decrease benefits but also those that "suspend benefit payments."

The view of the ERISA regulatory authorities thus corresponds to the terms of art that Congress used in Section 204(g). "There is no doubt that the drafters knew how to include the concept of suspension, in contrast to that of reduction, when they wanted to do so." Pet. App. 24a (Cudahy, J., dissenting). "Throughout the statute and corresponding regulations, the concepts of reduction of benefits and suspension of benefit payments are used in distinct ways, often within a single provision." *Spacek* v. *Maritime Ass'n. ILA Pension Plan*, 134 F.3d 283, 288 (CA5 1998). "[U]nder the plain language of the statute, a suspension of benefit payments is not a reduction of benefits * * *." *Id.* at 289.

Section 203(a)(3) itself is the most telling illustration of this point. As discussed above, under that provision, benefits are not impermissibly "forfeitable" if payments are "suspended" in the event the participant chooses to engage in disqualifying employment. § 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B). But Section 203 also states that benefits are not forfeitable if, pursuant to provisions governing financially distressed and terminated multiemployer plans, "the plan is amended to reduce benefits" (§ 203(a)(3)(E)(ii)(I), 29 U.S.C. 1053(a)(3)(E)(ii)(I)) or, in other circumstances, "benefit payments" are "suspended" (§ 203(a)(3)(E)(ii)(II), 29 U.S.C. 1053(a)(3)(E)(ii)(II)). Section 203(a) also provides that benefits are not "forfeitable" to the extent a plan amendment adopted pursuant to Section 302(c)(8) "reduces the accrued benefit of [a] participant." § 203(a)(3)(C), 29 U.S.C. 1053(a)(3)(C) (incorporating § 302(c)(8), 29 U.S.C. 1082(c)(8)). And the closely related provisions of Title IV of ERISA define "nonforfeitable benefit" as "a benefit for which a participant has satisfied the conditions for entitlement * * *, whether or not the benefit may subsequently be reduced or suspended by a plan amendment." 29 U.S.C. 1301(a)(8).

The provision on which respondents rely, Section 204(g), states that the "accrued benefit of a participant under a plan may not be decreased by an amendment." § 204(g)(1), 29 U.S.C. 1054(g)(1). But Section 204 also addresses the distinct circumstance in which benefits are "suspended" as a result of disqualifying employment. In the case of a participant in a defined benefit plan who has reached normal retirement age but has not started receiving benefits, the plan shall make an "adjustment in the benefit payable * * * attributable to the delay in the distribution of benefits after the attainment of normal retirement age," unless "the payment of benefits [has been] suspended * * * pursuant to section 203(a)(3)(B)." § 204(b)(1)(H)(iii)(II), 29 U.S.C. 1054(b)(1)(H)(iii)(II).

The same clear distinction in Congress's use of the terms "reduction" and "suspension" exists in the provisions of ERISA regarding financial distress that both Section 203(a)(3) and Section 204(g) incorporate. For example, when the benefits owed by a terminated plan exceed its assets, "the plan sponsor shall amend the plan to reduce benefits under the plan to the extent necessary to ensure that the plan's assets are sufficient." § 4281(c)(1), 29 U.S.C. 1441(c)(1). But if the plan remains "insolvent" despite the fact that "the plan has been amended to reduce benefits," then "payments which are not basic benefits shall be suspended." § 4281(d), 29 U.S.C. 1441(d). Those same provisions also require a plan to "reduce benefits" or (if that fails to restore the plan to financial health) to "suspend benefit payments" when a plan becomes "nonoperative" and "terminates" under certain circumstances. § 4041A(d), 29 U.S.C. 1341a(d). And a trustee of a terminated multiemployer plan has the power "to reduce benefits or suspend benefit payments under the plan." § 4042(d)(1)(A)(v), 29 U.S.C. 1342(d)(1)(A)(v).

3. The statutory structure similarly confirms the view of the ERISA regulatory authorities that the anti-cutback rule does not limit the authority conferred by Section 203(a)(3)(B) to adopt plan provisions relating to disqualifying

employment. The purpose of the accrual rules set forth in Section 204 is to prevent employers from avoiding the vesting requirements of Section 203. For example, the provision of Section 203(a) specifying that a participant's benefits must vest at a certain annual percentage, see 29 U.S.C. 1053(a)(2), is reinforced by, for example, the requirement of Section 204, 29 U.S.C. 1054, that the participant's benefits must accrue at a certain rate (ensuring that they are not "backloaded" to later periods of the participant's employment). The same is true of the anti-cutback rule, which prevents plans from reducing benefits before they vest under Section 203.

It is thus uniformly acknowledged that "Congress adopted § 1054 [§ 204] because it was concerned that without fair and equitable procedures for computing accrued pension benefits, employers could easily circumvent the requirements of minimum vesting which are essential to the Act." *Dameron* v. *Sinai Hosp. of Balt.*, 815 F.2d 975, 979 (CA4 1987). Section 204 "should be read together with section 203 to protect the employee against efforts to circumvent section 203's vesting rules." *Jones* v. *UOP*, 16 F.3d 141, 144 (CA7 1994) (Posner, then-C.J.).

The governing regulations recognize that extending the anti-cutback rule to protect a right to benefit payments that does *not* vest under Section 203(a) would not further Congress's purpose in enacting Section 204. In Section 203(a)(3)(B), Congress specifically tempered the vesting standards by authorizing plans to provide for the suspension of benefits during disqualifying employment. From the fact that Congress designed the statutory vesting rules to authorize such suspension, it follows that Congress did not intend that the anti-circumvention provisions of Section 204 would limit that very authority.[9]

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[9] Nor does the suspension of benefit payments pursuant to Section 203(a)(3)(B) otherwise vindicate an interest, which might be deemed implicit in Section 204(g), in protecting participants' benefits from unilateral reduction by plans. Employment disqualification arises only when the participant *himself* decides to *leave* retirement and to secure a further income.

4. The drafting history and legislative history confirm that Congress crafted Section 204(g) so as not to limit plans' authority under Section 203(a)(3)(B) to adopt employment disqualification amendments that apply to previously accrued benefits. The provisions of ERISA that became Sections 203(a)(3)(B) and 204(g) were added simultaneously in February 1974 in Section 203 of the House bill. See 2 ERISA Legis. Hist. at 2772, 2836, 2841 (H.R. 12906, §§ 3(19), 203(a), 203(f)(1)).[10] The bill also provided that "a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan provides that * * * the *payment of benefits is suspended* during periods when the participant has resumed employment with the employer (or, in the case of a multiemployer plan, has resumed employment in the industry before normal retirement age)." *Id.* at 2772 (§ 3(19) (emphasis added), *incorporated by* § 203(a)). By contrast, the bill provided that "a plan may not be amended in a manner which *reduces benefits* which accrued before the plan year preceding the plan year in which the amendment is adopted." *Id.* at 2841 (§ 203(f)) (emphasis added). The distinction between the suspension of benefit payments and the reduction of benefits remained consistent through ERISA's final enactment.[11]

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[10] Earlier versions of the bill did not include either provision. See 1 ERISA Legis. Hist. at 10 & 51 (H.R. 2, §§ 3(20) & 203), 75 (H.R. 462, § 3(26)), 103 & 116 (S. 4, §§ 3(26) & 201-202), 235 (S. 1179, § 322), 328 (S. 1631, § 12(a)), 494 & 509 (S. 4, §§ 3(26) & 202), 695 & 745 (H.R. 9824, § 3(19) & 203(a)), 837 (S. 1179, § 221(a)), 1288-89 (S. 4, § 221(a)); 2 ERISA Legis. Hist. at 1901 (H.R. 4200, § 221(a)), 2251-52 & 2304 (H.R. 2, §§ 3(19) & 203(a)).

[11] Compare *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 430 (1995) (determining date that interest runs on multiemployer plan's withdrawal liability in

The legislative history of the 1984 amendment specifying that Section 204(g) applies to early retirement benefits similarly confirms that Congress did not thereby intend to impose some further limitation on plans' express authority under Section 203(a)(3)(B) to adopt plan provisions under which benefit payments are suspended during periods of disqualifying employment. The same 1984 amendment that added Section 204(g)(2) also modified Section 203, but notably left Section 203(a)(3)(B) untouched.

The principal sponsor of the 1984 amendment, Representative William Clay, moreover addressed the very question presented by this case. He explained at the time that Section 204(g) does not "*in any way* apply to or affect the provisions of ERISA section 203(a)(3)(B) * * * relating to the suspension of benefits for postretirement employment, including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits." 130 Cong. Rec. 23,487 (1984) (emphasis added).

Representative Clay's remarks are confirmed by the reports accompanying the bill. The Senate Report specifies that the amendment merely "clarifies the scope of the prohibition against [benefit] decreases," and thus "does not affect the application of any other provision of the Code." S. Rep. No. 98-575, 98th Cong., 2d Sess. 28 (1984). In particular, the amendment "does not change any rules under which accrued benefits become vested." *Ibid.* The "vesting" of benefits is governed by the forfeitability provisions of Section 203(a), including Section 203(a)(3)(B). See *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 376 (1980) (stating that in ERISA, "the terms 'vested' and 'nonforfeitable' were used synonymously" (citing § 3(25), 29 U.S.C. 1002(25)

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part based on the fact that "throughout the bill's history, the valuation date and interest-accrual date moved about in an apparently uncoordinated way. This somewhat undermines the Plan's suggestion that Congress was very concerned about the interplay between the two.").

("'vested liabilities' means the present value of the immediate or deferred benefits available at normal retirement age for participants and their beneficiaries which are nonforfeitable"))). And the House Report similarly confirms that Congress did not intend to overturn the government's consistent practice of approving plan amendments that expand the definition of disqualifying employment. It explains that Section 204(g)(2) "codifies present law generally precluding the elimination or reduction of benefits that have already been accrued by employees." H.R. Rep. No. 98-655, 98th Cong., 2d Sess. 25-26 (1984). Cf. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 519 (1981) ("[W]hen it enacted ERISA, Congress knew of the IRS rulings permitting integration and left them in effect.'").

5. Against all this, the Seventh Circuit based its conclusion that a plan provision providing for the suspension of the payment of benefits that have previously accrued violates Section 204(g) on the theory that the anti-cutback rule forbids the addition of any material "condition" on a participant's benefits (Pet. App. 9a, 15a), and that by extending the scope of disqualifying employment the Suspension Provision placed an additional condition on respondents' "right" post-retirement "to work as construction supervisors and continue to receive their monthly benefit payments" (*id.* 8a).[12]

The fatal flaw in the Seventh Circuit's reasoning is that the "right" conjured by the court of appeals is not a "benefit" protected by ERISA and, *ipso facto*, is not a "benefit" that the Suspension Provision can be said to have decreased in violation of Section 204(g). A benefit is defined by the plan document, generally as a stream of payments. See *Alessi*, 451

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[12] The breadth of the court of appeals' holding is startling. On the Seventh Circuit's view, every employment disqualification provision not limited merely to benefits that are earned in the future violates the anti-cutback rule with respect to *every* participant, whether retired or not, who has previously accrued benefits.

U.S. at 514. The plan in this case, like the other plans with which petitioner is familiar, provides no assurance and no right that the participant will secure post-retirement employment. And any interference by the Plan in respondents' efforts to secure such employment is not actionable under ERISA.

Beyond this, it is a second complete answer to the Seventh Circuit's reasoning that Congress expressly authorized the "condition" at issue in this case. The very point of the forfeitability rules of ERISA Section 203(a) is to identify the circumstances in which a benefit must be "unconditional." § 203(a), 29 U.S.C. 1053(a), *incorporating* § 3(19), 29 U.S.C. 1002(19). A suspension of benefits provision authorized by Section 203(a)(3)(B) is, by its very nature, a condition on accrued benefits that Congress concluded was lawful.[13]

Finally, the Seventh Circuit erred in attributing significance to the fact that the suspension of benefit payments for disqualifying employment results in a loss of pension income forever. See Pet. App. 10a. Congress approved that result in the carefully defined circumstances set forth in Section 203(a)(3)(B). As the regulations explain, in the event of suspension, "[a] plan may provide for the permanent withholding" of benefit payments. 29 C.F.R. 2530.203-3(b)(1). That result is "acceptable if they withdraw

[13] Indeed, because the Suspension Provision is specifically contemplated by Section 203(a)(3)(B) and its implementing regulations, this case does not present the question whether Section 204(g) prohibits a pension plan amendment that adds a material condition on previously accrued "benefits" as opposed to "benefit payments." As discussed in the text, the distinction between those terms is well established in ERISA. This case can accordingly be resolved on the narrow ground that Congress specifically authorized plans to adopt conditions on the receipt of benefit payments by participants who elect to engage in disqualifying employment.

from retirement and return to the workforce, later to place additional demands upon the plan. They suffer no loss of regular income and are merely deprived of a bonus in the form of a dual recovery at the expense of the construction industry. Meanwhile, the financial integrity of the plan may be affected by continuing to make retirement provisions for participants who have not really retired." Pet. App. 31a (Cudahy, J., dissenting).

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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No. 02-891

In the Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,

Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Under the "anti-cutback" rule contained in section 204(g)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054(g)(1), "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," unless that amendment is authorized under two sections of ERISA not relevant here. ERISA § 204(g)(2), added by the Retirement Equity Act of 1984, clarifies that "[f]or purposes of" this anti-cutback rule, "a plan amendment which has the effect of * * * (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy * * *, or (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits," and thus is also prohibited.

The question presented is whether, when an ERISA pension plan is amended to expand the categories of "disqualifying" post-retirement employment that "suspend" early retirement benefits under the plan, it violates ERISA's anti-cutback rule to apply that amendment to the accrued benefits of plan participants who had already retired, were already receiving those benefits, and were already working in forms of post-retirement employment that were non-disqualifying under the prior version of the plan but are disqualifying under the amended version of the plan.

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BRIEF FOR THE RESPONDENTS

The anti-cutback rule contained in section 204(g) of ERISA, 29 U.S.C. § 1054(g), provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," and clarifies that under this provision an amendment that "has the effect of * * * (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy * * *, or (B) eliminating an optional form of benefit," if that benefit is "attributable to service before the amendment," is a prohibited decrease. In this litigation, the Seventh Circuit held that an amendment that expanded the conditions under which a pension fund can "suspend" payment of already-accrued benefits violates this anti-cutback rule. The Seventh Circuit's decision is entirely faithful to the statute's language and is plainly correct.

RELEVANT STATUTORY PROVISIONS

ERISA §§ 3(23), 203(a), 203(a)(3), 204(c)(3) & 204(g), which are codified at 29 U.S.C. §§ 1002(23), 1053(a), 1053(a)(3), 1054(c)(3) & 1054(g), are reproduced in relevant part in the addendum to this brief.

STATEMENT OF THE CASE

1. ERISA "is a 'comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system.'" *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980))). It is a commonplace that ERISA does not require an employer to provide its employees with any specific benefits. See, *e.g.*, *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996); Pet. App. 5a-6a. ERISA does, however, extensively regulate benefits once those benefits *are* provided. Thus, "ERISA protects employee pensions and

other benefits by providing insurance (for vested pension rights), specifying certain plan characteristics in detail (such as when and how pensions vest), and by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans." *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996) (citations omitted); see also Pet. App. 6a.

For example, ERISA § 203 places various limits on the terms that can be included in a pension plan. Importantly, ERISA § 203 limits what terms can *ever* be in a plan; it says nothing about the permissibility of plan amendments. Under this section, a pension fund may "provide[]" that the payment of normal retirement benefits be "suspended" when a participant has resumed specific types of employment after initially retiring – but limits what types of subsequent employment can lead to such suspensions. See ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B). In the case of participants in a "multiemployer plan,"[1] normal retirement benefits may be suspended only if the participant resumes work in a job "in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced," and only during the period in which the participant is engaged in this disqualifying employment. ERISA § 203(a)(3)(B)(ii), 29 U.S.C. § 1053(a)(3)(B)(ii).[2]

[1] ERISA § 3(37), 29 U.S.C. § 1002(37), defines a multiemployer plan as a plan "maintained pursuant to one or more collective bargaining agreements" between a union or unions and employers, "to which more than one employer is required to contribute." Multiemployer plans "are common in industries with many small companies, each too small to justify an individual plan. They are also found in industries where, because of seasonal or irregular employment and high labor mobility, few workers would qualify under an individual company's plan (if one were established)." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 62-63 (3d ed. 2000) (quoting EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-59 (3d ed. 1987)).

2. As this Court has repeatedly explained, "when Congress enacted ERISA it 'wanted to make sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.'" *Lockheed*, 517 U.S. at 887 (quoting *Nachman*, 446 U.S. at 375) (internal alterations omitted). Thus, ERISA provides, for example, a host of funding and vesting rules to protect participants' promised benefits. See page 2, *supra*; Pet. App. 6a. But the most direct protection of workers' reasonable reliance interests is the "anti-cutback" rule contained in ERISA § 204(g).

As originally enacted, ERISA § 204(g) provided that, with narrow exceptions, "[t]he accrued benefit of a participant under a plan *may not be decreased by an amendment of the plan*." Pub. L. No. 93-406, Tit. I, § 204(g), 88 Stat. 858

[2] Although a plan is required to abide by ERISA § 203(a)(3)(B)'s suspension rules in the case of "normal" retirement benefits – that is, retirement benefits available to an employee who has reached the normal retirement age, either as defined in the plan or under ERISA's default "normal" retirement age of 65 (see ERISA § 3(24), 29 U.S.C. § 1002(24)) – these rules do not apply to "early" retirement benefits. Thus, the Department of Labor's regulations implementing ERISA § 203 specify that "[a] plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age * * * for any reemployment and without regard to the provisions of section 203(a)(3)(B) and this regulation to the extent (but only to the extent) that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." 29 C.F.R. § 2530.203-3(a).

(emphasis added).[3] Because of the way accrued benefits were defined under ERISA, some courts found that this provision "did not prevent the reduction of a plan's alternative schedule of benefits for workers who retired early." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 164 (3d ed. 2000); see also U.S. Br. 20-21. Congress legislatively cured this uncertainty in 1984 by amending ERISA § 204(g). The existing general rule was renumbered as section 204(g)(1), and a new subsection 204(g)(2) was added, which provides that:

> For purposes of paragraph (1), a plan amendment which has the effect of –
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, § 301(a)(2), 98 Stat. 1451.

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[3] Reductions in benefits were allowed "with the consent of the Secretary of Labor, in the event of a substantial business hardship, (sec. 412(c)(8) of the [Internal Revenue] Code [and the parallel section 302 of ERISA]) or [under] the rules permitting a reduction of benefits in the case of certain multiemployer plans (sec. 4281 of ERISA)." S. REP. NO. 98-575, at 30.

3. The Central Laborers' Pension Fund ("the Fund") is a multiemployer pension fund whose participants are mainly construction workers in central Illinois. The Fund is a "qualified" pension plan governed by ERISA. Participants are entitled to a variety of retirement benefits under the Fund; in particular, the Fund offers a traditional retirement pension (available to participants aged 65 or older), as well as two distinct forms of early-retirement benefits. All three are "defined benefit" pensions.[4]

Eligibility for the form of early-retirement benefit at issue in this case, which the Fund calls a "Service-Only Pension," depends only on the number of years of "vesting service" or the number of "pension credits" that the participant has accrued. See J.A. 38.[5] Participants may retire and receive their "service-only" pension once they have accumulated 30 "pension credits," regardless of their age at the time of retirement. The pension a participant receives each month under the "service-only" program is the same amount he would receive each month under the normal retirement plan. See *ibid.*; Pet. App. 4a. Thus, because statistically an early retiree is ex-

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[4] A "defined benefit" retirement plan "is one where the employee, upon retirement, is entitled to a fixed periodic payment." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999) (citation and internal quotation marks omitted). "[T]he employer typically bears the entire investment risk" in a defined benefit plan. *Ibid.* Defined benefit plans contrast with "defined contribution plans," which are "one[s] where employees and employers may contribute to the plan, and the * * * employee receives whatever level of benefits the amount contributed on his behalf will provide." *Ibid.* (citation and internal quotation marks omitted).

[5] Under the Plan, "pension credits" are accrued based on the number of years that the participant has worked for employers who participate in the Fund and the number of hours the participant worked for these employers in each of those years. See J.A. 37 (Plan § 3.5(a)).

pected to receive his pension for a longer period than someone retiring at the "normal" age, the "service-only" pension is a "retirement-type subsidy" as that term is used in ERISA § 204(g)(2)(A). See *Bellas* v. *CBS, Inc.*, 221 F.3d 517, 525 (3d Cir. 2000).

4. Thomas E. Heinz and Richard J. Schmitt, Jr. are each participants in the Fund. Pet. App. 4a; J.A. 78. As of 1996, each had accrued at least 30 "pension credits," and thus had met all of the conditions to retire and to receive his "service-only" pension. Both did so. *Ibid.* Under the terms of the Fund when Messrs. Heinz and Schmitt retired, the service-only pension was to be suspended if a participant worked in specified "disqualifying employment." Although working as a union or non-union construction worker was disqualifying under the plan as it then existed (see *ibid.*), it is uncontroverted that working as a *supervisor* in the construction industry was *not* "disqualifying employment." See J.A. 79; Pet. App. 5a. After retiring as construction workers, both respondents began working as supervisors in the construction industry, while – as the plan allowed – collecting their early-retirement pensions. J.A. 80.

Two years after respondents retired, the Fund amended the terms of the plan to expand the definition of disqualifying employment for purposes of early-retirement benefits. Under this 1998 amendment, the Fund would suspend early retirement benefits for work "in any capacity in the construction industry (either as a union or non-union construction worker)." See J.A. 63 (Plan § 6.7(b)(1)), 79-80; Pet. App. 5a. Although this amendment focused on "construction worker[s]," the Fund interpreted the amendment to prohibit employment even in a supervisory capacity in the construction industry. The plan also construed the amendment to apply to participants who had already qualified for early-retirement benefits prior to the amendment. Because Messrs. Heinz and Schmitt continued to work as supervisors in the construction industry, the Fund notified them that payment of

their benefits would be suspended if they did not quit their jobs and, when they did not, suspended payment of their early retirement pension benefits.

5. After exhausting intra-Fund avenues for review of the decision to suspend payment of their benefits, Messrs. Heinz and Schmitt brought suit in the Central District of Illinois. See J.A. 10-19. They claimed that the retroactive application of the 1998 Amendment to suspend their benefits violated the plain terms of the anti-cutback rule in ERISA § 204(g), which precludes amendments that "decrease[]" accrued benefits and, in particular, amendments that "ha[ve] the effect of eliminating or reducing an early retirement benefit." See J.A. 15.[6] On cross-motions for judgment on the pleadings, the district court ruled in the Fund's favor. See Pet. App. 33a-45a.

6. The Seventh Circuit reversed. See Pet. App. 3a-31a. According to the court of appeals,

> plaintiffs' loss of the option of working as construction supervisors was a reduction of their early retirement benefits within the meaning of [ERISA § 204(g)(2)]. A participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit "reduces" the benefit just as surely as a decrease in the size of the monthly benefit payment.

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[6] In the alternative, they argued that the Fund acted arbitrarily and capriciously in interpreting the 1998 amendment to render their employment disqualifying because the amendment by its terms is limited to employment as a (union or non-union) "*construction worker*," rather than as a *supervisor* in the construction industry. J.A. 17-18 (emphasis added).

Pet. App. 9a. The court rejected the Fund's attempt to distinguish between an amendment that allows the Fund to suspend payments in a broader range of circumstances and amendments that decrease the value of benefits in other ways. As the court explained,

> [a]lthough with a suspension the interruption in benefit payments is temporary, the retiree never recovers the payments lost during the employment period. The amendment thus "eliminates" monthly benefit payments for participants who take certain jobs after retirement and "reduces" the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues. Plaintiffs lost a valuable right they had earned before the amendment – the right to continue to work in the industry while receiving monthly benefit payments – and that loss was permanent.

Pet. App. 10a.

The court considered the Fifth Circuit's decision in *Spacek* v. *Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), on which the district court had relied, but found it unconvincing. Pet. App. 11a-22a. In particular, the court disputed the notion that its decision would render the word "suspension" redundant elsewhere in ERISA (Pet. App. 12a-15a), explained that a comment by Representative Clay in the final House debates over REA was ambiguous at best and in any event due little weight (Pet. App. 16a-17a), and found a Treasury Regulation relied on by *Spacek* to be irrelevant to the interpretation of the appropriate scope of the anti-cutback rule (Pet. App. 18a-20a). Having ruled for respondents on statutory grounds, the court did not reach respondents' alternative arbitrary-and-capricious argument. See Pet. App. 23a. Judge Cudahy dissented. See Pet. App. 24a-31a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although it is easy to lose sight of the controlling ERISA principle in the maze of distracting and inapposite technicalities constructed by petitioner and its *amici*, the issue here actually is simple and straightforward. "[W]hen Congress enacted ERISA it 'wanted to make sure that if a worker has been *promised* a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will *receive* it.'" *Lockheed*, 517 U.S. at 887 (quoting *Nachman*, 446 U.S. at 375) (emphasis added; internal alterations omitted). Under the explicit terms of the pension plan that existed during the time when Messrs. Heinz and Schmitt were accruing their pension benefits, they were promised that after retiring from their jobs as construction workers they would be entitled to receive a specific amount of money each month *whether or not* they thereafter accepted employment as supervisors in the construction industry. By amending the terms of the plan such that respondents would *not* receive benefit payments if they worked as supervisors, the Fund broke its promise to them, and, by "decreas[ing]" the value of their pension benefits, manifestly violated the plain terms of the anti-cutback rule, ERISA § 204(g).

The statutory command of ERISA § 204(g) is straightforward; plans cannot be amended to decrease the value of previously accrued benefits. Critically, the "accrued benefits" of plan members are more than merely a specific number of dollars a month. In fact, the government's own regulations implementing ERISA are full of examples demonstrating that *terms and conditions affecting accrued benefits*, even if not expressed in the form of dollars-per-month, are nonetheless protected by the anti-cutback rule and cannot be changed retroactively. Because the opportunity to work in specific jobs while receiving benefits is plainly a valuable right, removing that opportunity is forbidden.

Rather than focus on the anti-cutback rule, petitioner and its *amici* devote endless attention to ERISA § 203(a)(3)(B), which limits the types of suspension rules the drafters of a plan may include under specific circumstances. This statutory provision is simply irrelevant to this case. First of all, because respondents are receiving *subsidized early retirement benefits*, rather than the "*normal retirement benefits*" addressed in ERISA § 203(a), ERISA § 203(a)(3)(B) by its very terms does not apply. In any event, even if ERISA § 203(a)(3)(B) were to apply to early retirement benefits, this subsection merely authorizes plans to "provide" suspension rules *in the first place*; it says nothing whatsoever about whether a plan may *amend* its suspension rules, let alone whether any such amendment may apply to benefits earned before the date of that amendment. *That* is the job of the anti-cutback rule. This distinction between *creating* a plan that allows for suspensions and *changing* a plan after the fact to alter dramatically the circumstances in which suspensions are permissible is fundamental to ERISA. By ignoring that distinction, petitioner would pull the rug out from under retirees and defeat legitimate expectations – the very outcome ERISA was enacted to prevent.

Finally, petitioner and its *amici* focus extensively on a number of regulations, on legislative history, and on policy arguments that they suggest should cause this Court to depart from the plain text of ERISA. Not only are these arguments far from sufficient to warrant violating the cardinal rule that it is the *text* of a statute that controls, but they also fall apart on closer examination. Neither the regulations nor the legislative history nor the various policies underlying ERISA suggest that a plan should be allowed to break its promise to its participants and to change plan provisions retroactively.

ARGUMENT

I. UNDER ERISA § 204(g), A PENSION PLAN MAY NOT BE AMENDED TO EXPAND THE TYPES OF POST-RETIREMENT EMPLOYMENT UNDER WHICH PREVIOUSLY ACCRUED PENSION BENEFITS MAY BE SUSPENDED.

This case should begin and end with the clear mandate of ERISA § 204(g), the anti-cutback rule.[7] Under that provision, "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," unless the amendment falls within exceptions for plans undergoing substantial business hardship or that have been terminated. See ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). The statute clarifies further that included within this blanket prohibition are amendments that "ha[ve] the effect of – (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (B) eliminating an optional form of benefit." *Id.* § 204(g)(2), 29 U.S.C. § 1054(g)(2). Amending a plan to include an expanded suspension rule "decrease[s]" the value of benefits accrued before that amendment, and thus violates the anti-cutback rule.

It is a foundational principle of ERISA law that pension benefits, once accrued, may not be reduced. This Court has repeatedly explained that "when Congress enacted ERISA it 'wanted to make sure that if a worker has been promised a

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[7] In this brief we focus on Title I of ERISA – and in particular on ERISA § 204(g) and ERISA § 203(a)(3)(B) (26 U.S.C. §§ 1054(g), 1053(a)(3)(B)) – rather than on the parallel provisions of the Internal Revenue Code that were promulgated as Title II of ERISA – IRC §§ 411(d)(6) and 411(a)(3)(B). The Code provisions are in all relevant respects identical to the ERISA provisions, except that while a plan is *forbidden* from violating the ERISA provisions, a violation of the Code provisions merely renders the plan *unqualified* for favored tax treatment.

defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.'" *Lockheed*, 517 U.S. at 887 (quoting *Nachman*, 446 U.S. at 375) (internal alterations omitted); see also, *e.g.*, *Boggs* v. *Boggs*, 520 U.S. 833, 845 (1997) ("The principal object of the statute is to protect plan participants and beneficiaries."); S. REP. NO. 93-127, at 1 (ERISA addresses "the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement") (*reprinted at* I ERISA LEGIS. HIST. 587).

To implement this precept, Congress included the anti-cutback rule in ERISA. Furthermore, after several courts interpreted the initial version of the anti-cutback rule to be inapplicable to early retirement benefits, Congress clarified that the statute protects these benefits, as well. See page 4, *supra*; U.S. Br. 20-21; S. REP. NO. 98-575, at 27 ("the protection of accrued benefits, which are essentially retirement benefits, against reduction by plan amendments is an essential safeguard for plan participants and their beneficiaries").

There are two evident questions that must be answered in analyzing the scope of the anti-cutback rule: first, *what* benefits are protected by this rule, and second, *from what* are those benefits protected. Although neither petitioner nor its *amici* have focused on it in the slightest, this case revolves around the answer to the first of these questions.

A. The "Accrued Benefits" Protected By The Anti-Cutback Rule Include All The Terms And Conditions That Affect The Value Of Those Benefits.

The anti-cutback rule protects a participant's "accrued benefit." See ERISA § 204(g)(1). That "accrued benefit" must be determined by reference to the terms defining entitlement to those benefits. Thus, in the case of a defined benefit plan, an accrued benefit "is defined as 'the individual's accrued benefit *determined under the plan* [and ordinarily is] expressed in the form of an annual benefit commencing at retirement age.'" *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 440 (1999) (quoting ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A)) (emphasis added, alteration in *Hughes*).

Although this definition is in part circular, its basic thrust is clear – the accrued benefit under a plan is whatever benefit the plan promised to its participants. Thus, this Court has explained that "ERISA leaves [the] question [of the content of the benefits protected by a plan] largely to the private parties creating the plan." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). In other words, the parties to a plan, "not the Government, control the level of benefits" offered under that plan. *Ibid.*; see also, *e.g.*, *Lockheed*, 517 U.S. at 887 ("ERISA [does not] mandate what kind of benefits employers must provide if they choose to have [a benefit] plan").

The fundamental fallacy in petitioner's analysis of this case is to view the respondents' accrued benefit simply in terms of the number of dollars to which each is entitled per month or per year, in years when they were eligible for benefits. While of course that is a significant part of the definition of their benefit under the plan, it is by no means the entire definition. Rather, various *other* terms and conditions contained in the Plan – including the terms specifying under what conditions benefit payments will be suspended for post-retirement employment – are also part of a participant's "accrued benefit." ERISA, the regulations implementing it, and the case law interpreting it are full of evidence that one must define "accrued benefit" broadly. In fact, the proposition that the accrued benefit under a plan must be understood to be more than simply a dollar amount per year is uncontroversial. The following five aspects of the statute and the regulations implementing it demonstrate this fact beyond any reasonable doubt. Thus, because the suspension terms are part of

Messrs. Heinz and Schmitt's accrued benefits, they, too, are protected by the anti-cutback rule.

1. Although under ERISA § 3(23) – which defines the term "accrued benefit" – one normally "expresse[s]" an accrued benefit in terms of the amount of money to which the participant is entitled per year commencing at normal retirement age (*ibid.*; see also *Hughes Aircraft*, 525 U.S. at 440; pages 12-13, *supra*), that does not imply that the accrued benefit provided by a plan is always, or even usually, simply a specified amount of money per year, nor does it suggest that the full value of a benefit can always be captured in such a formula. That is the point of ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), which is cross-referenced in ERISA § 3(23) and explains that "if an employee's accrued benefit [under a plan] is to be determined as an amount other than an annual benefit commencing at normal retirement age * * * the employee's accrued benefit * * * shall be the *actuarial equivalent* of such benefit." (emphasis added)[8] In other words, the plan defines the benefit that is protected; it is up to the plan's actuaries to place a dollar value on that benefit for actuarial purposes. See, *e.g.*, *Lindsay* v. *Thiokol Corp.*, 112 F.3d 1068, 1071 (10th Cir. 1997) (accrued benefit can be defined as "86.7% of some other quantity").

2. Another example demonstrating the breadth of the term "accrued benefit" is the IRS's regulations under the Code equivalent to ERISA § 204(g), which provide that, while the availability of benefits (or of a specific form of benefit) may be "limited to employees who satisfy certain

[8] The IRS's regulation defining the term "accrued benefit" likewise explains that an accrued benefit under a defined benefit plan is an "annual benefit commencing at normal retirement age" unless the plan uses a different form, at which point the accrued benefit is the actuarial equivalent of the benefit defined in the plan. See 26 C.F.R. § 1.411(a)-7(a).

objective conditions" (26 C.F.R. § 1.411(d)-4 Q&A-6), "[t]he *addition* of * * * objective conditions with respect to a * * * protected benefit that has already accrued" violates the anti-cutback rule, as does "any *change* to existing conditions * * * that results in any further restriction." 26 C.F.R. § 1.411(d)-4 Q&A-7 (emphasis added).[9] In other words, it is not only the payment of a specific number of dollars per month that is protected by the anti-cutback rule, nor is it merely the actuarial value of that stream of benefits that is protected. Rather, the anti-cutback rule protects all aspects of those benefits – including conditions related to their payment – as defined by the plan at the time those benefits accrued.[10]

[9] As the government explains in its brief, the regulations implementing IRC § 411(d)(6), the Internal Revenue Code equivalent to ERISA's anti-cutback rule, also apply to the ERISA provision codified at ERISA § 204(g). See U.S. Br. 23 n.8.

[10] In fact, ERISA § 204(g)(2) itself confirms this understanding. The statute notes that, "[i]n the case of a retirement-type subsidy, the [anti-cutback rule] shall apply only with respect to a participant who satisfies (either before or after the amendment) *the preamendment conditions* for the subsidy." (emphasis added). In other words, a plan can create a new retirement-type subsidy with different conditions, but, at least with respect to previously accrued benefits, must allow participants to "grow into" the preamendment retirement-type subsidy by satisfying the conditions for that subsidy that had existed and formed part of the definition of that subsidy. See, *e.g.*, *Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1036 (7th Cir. 1996) ("The courts of appeals that have ruled on an employee's right to 'grow into' early retirement benefits have * * * uniformly held that as long as an employee satisfies, or will be able to satisfy, the eligibility requirements of the early retirement benefit in effect prior to the amendment, § 204(g) protects the benefit."); *Hein* v. *FDIC*, 88 F.3d 210, 213 (3d Cir. 1996) (same); *Hunger* v. *AB*, 12 F.3d 118, 120 (8th Cir. 1993) (same).

The examples given under these IRS regulations demonstrate this fact well. For example, although *ex ante* "a plan may provide that a single sum distribution is available only if the employee is in extreme financial need as defined under the terms of the plan" or condition lump-sum distribution "on the execution of a covenant not to compete" (*id.* at Q&A-6), no such condition can be added by amendment and applied to previously accrued benefits (*id.* at Q&A-7). Importantly, even though in each of these two instances the specified condition has no actuarial effect on the dollar value of the benefits provided – lump-sum distributions are calculated by determining the expected value of a stream of monthly payments (see ERISA § 204(c)(3)) – nonetheless, because the addition of these conditions decreases the *real-world* value of a participant's accrued benefit, such conditions violate the anti-cutback rule.

Because the conditions under which an accrued benefit will be paid are themselves part of that benefit, it follows that even contingent benefits that may *never* be paid are protected by the anti-cutback rule. For example, certain forms of "plant shutdown" benefits are "accrued benefits" for purposes of the anti-cutback rule, even though the participant is entitled to *nothing* under such a benefit unless the plant is in fact closed. See, *e.g.*, *Bellas*, 221 F.3d 517; *Richardson* v. *Pension Plan of Bethlehem Steel Corp.*, 67 F.3d 1462 (9th Cir. 1995), *withdrawn on other grounds by* 112 F.3d 982 (9th Cir. 1997); *Harms* v. *Cavenham Forest Indus., Inc.*, 984 F.2d 686 (5th Cir. 1993); Ameri R. Giannotti, Comment, *ERISA's Anticutback Rule And Contingent Early Retirement Benefits*, 68 U. CHI. L. REV. 1341 (2001).[11] Plans occasionally argue

[11] Under the protected type of plant shutdown benefit, a participant is entitled to a subsidized early retirement benefit commencing at the time of shutdown. This discussion focuses only on plant-shutdown benefits that are payable for life; other forms of severance pay arrangements are employee *welfare* plans instead of

that this form of benefit is not protected by the anti-cutback rule because the benefit depends on a contingent event – the plant being closed – and because it is difficult to place an actuarial value on such benefits. But such benefits are simply subsidized early retirement benefits contingent on an objective condition – plant closure – and therefore this argument is regularly rejected.[12] As the Third Circuit explained, "unpredictable contingent event benefits that provide a benefit greater than the actuarially reduced normal retirement benefit are retirement-type subsidies, and therefore are accrued benefits under section 204(g)." *Bellas*, 221 F.3d at 532. And the fact that the valuation of a contingent benefit "largely * * * defie[s] conventional actuarial principles" does not mean that those benefits have no value. *Id.* at 535.[13]

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employee *pension* plans, and therefore are not protected by the anti-cutback rule. See *Bellas*, 221 F.3d at 529; *Richardson*, 67 F.3d at 1468; *Harms*, 984 F.2d at 691 n.7 (citing 29 C.F.R. § 2510.3-1(a)(3)).

[12] Although a few old cases held that plant shutdown benefits are not protected by the anti-cutback rule (see *Ross* v. *Pension Plan for Hourly Employees of SKF Indus., Inc.*, 847 F.2d 329 (6th Cir. 1988); *Blank* v. *Bethlehem Steel Corp.*, 758 F. Supp. 697 (M.D. Fla. 1990)), that position has more recently been rejected by every court to consider it. See *Bellas*, 221 F.3d at 526-528, 532-533 (discussing these cases and explaining why they are wrong).

[13] *Amicus* Central States attempts to distinguish the plant-shutdown cases on the ground that in these cases the employer has some control over whether the contingent event occurs, whereas here the participant controls whether he or she accepts post-retirement employment. See Central States Br. 10. There are two responses. First, the question who can influence the occurrence of a contingent event is irrelevant to our point, which is that the conditions under which benefits will be paid under a pension plan must be understood to be a part of those benefits. Second, this distinction only suggests that plant closure benefits might not be al-

In its *amicus* brief, the government posits that 26 C.F.R. § 1.411(d)-4 Q&A-7 does not prevent a plan from changing the specific objective condition at issue here – whether respondents were working in the disqualifying employment specified in the plan at the time their benefits accrued. See U.S. Br. 27; see also Pet. Br. 27. As we discuss below (at Part II.B), that argument is based on a flawed interpretation of ERISA § 203(a)(3)(B). The important point to note, however, is that the government does not deny that, under this regulation, it is a fallacy to view the "accrued benefit" protected by the anti-cutback rule as simply the entitlement to the payment of a specific amount of money per month (or of the actuarial equivalent of that payment stream). Rather, the "conditions" under which a benefit will be paid are themselves part of the protected benefit.

3. Further proof that the accrued benefit under a plan is more than simply the entitlement to a specific amount of money per month comes from the fact that it is well established that "cost of living adjustment," or COLA, provisions are protected by the anti-cutback rule. See, *e.g.*, *Hickey* v. *Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992); *Shaw* v. *Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985).[14] In fact, the IRS acknowledges that a

lowed under ERISA at all, not that the terms of either plant closure benefits or of suspension rules do not form part of an accrued benefit. Under 26 C.F.R. § 1.411(d)-4 Q&A-6(a)(1), benefits may not be "subject to the *employer's* discretion." (emphasis added). However, nothing in ERISA precludes benefits from being subject to some act within the *employee's* discretion.

[14] In a pension plan that includes a COLA, the benefit provided in any given year increases "in order to offset or at least reduce the anticipated effects of inflation." See MICHAEL J. CANAN & DAVID R. BAKER, 1 QUALIFIED RETIREMENT PLANS § 3.52[D], at 217 (2002). For example, the COLA in *Hickey* "provided that if the

COLA provision cannot be removed with respect to previously accrued benefits. See *Bd. of Trustees of the Sheet Metal Workers' Nat'l Pension Fund* v. *Comm'r*, 318 F.3d 599, 605 (4th Cir. 2003).[15] As the Seventh Circuit explained, "[a] participant's right to have his basic benefit adjusted for changes in the cost-of-living accrue[s] each year along with the right to the basic benefit." *Hickey*, 980 F.2d at 469; see also *Shaw*, 750 F.2d at 1464. This is true even though it is actuarially difficult to value a COLA provision in terms of the entitlement to a specific amount of money per year, as accrued benefits are ordinarily expressed under ERISA § 3(23)(A).[16]

Consumer Price Index ('CPI') increased in any year following a participant's retirement, then the monthly benefit would be increased accordingly, thus preventing a reduction in the real value of the benefits." 980 F.2d at 466-467. Similarly, the "living pension" feature in *Shaw* "geared increases in the retiree's pension benefits to salary increases in the position the retiree held immediately prior to retirement." 750 F.2d at 1460.

[15] Because the participants on whose behalf the IRS sued in *Sheet Metal Workers* had retired *before* the plan was amended to include a COLA provision, the Fourth Circuit held that the COLA was not an accrued benefit *as to those particular participants*. See 318 F.3d at 604. Implicit in that analysis, however, is the court's acknowledgment that the COLA would have been protected by the anti-cutback rule for benefits accrued after the COLA provision was added to the plan.

[16] *Michael* v. *Riverside Cement Co. Pension Plan*, 266 F.3d 1023 (9th Cir. 2001), is another case that demonstrates the same point. In *Michael*, the participant initially retired and began receiving accrued pension benefits, but then subsequently returned to work for the same employer. At the time he initially retired, the plan's rules provided that any benefits paid under a "first" retirement would not be offset against benefits paid after a "second" retirement. See *id.* at 1024-1025. While Michael was working the sec-

4. In addition to 26 C.F.R. § 1.411(d)-4 Q&A-7, another IRS regulation also demonstrates the fallacy of arguing that the benefit protected by ERISA § 204(g) is merely the entitlement to a specific number of dollars per month upon reaching normal retirement age. The IRS has always interpreted the Code equivalent to the anti-cutback rule – IRC § 411(d)(6) – to preclude amendments that directly "*or indirectly*" affect a participant's accrued benefit. 26 C.F.R. § 1.411(d)-3(b) (emphasis added).[17] While the word "indirectly" is never defined, the examples given by the IRS, as well as case law applying this regulation, show that the "accrued benefit" that is protected by the anti-cutback rule in-

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ond time, the plan's rules were changed to require previously-paid benefits to be offset against a participant's accrued benefit if he reretired. The court rejected the plan's effort to apply this new rule to the benefits accrued prior to Michael's first retirement. As the court explained, the correct way to define those benefits was as the "payments [he] received *under the condition that*, if he were to be reemployed, as he was, they would not cause a reduction in his second retirement benefit based on his total years of service." *Id.* at 1027 (emphasis added). Changing that "condition" would reduce his benefits. See *ibid.* (explaining that one must "look[] beyond the net effect of a plan amendment on annual benefit payments, to the features of the benefit formula itself") (citing *Shaw*, 750 F.2d at 1463-1465). There is no analytical difference between the "offset" of prior benefit payments in *Michael* and the "suspension" of benefit payments at issue here.

[17] See also T.D. 7501, 1977-2 C.B. 133, 165 (promulgating 26 C.F.R. § 1.411(d)-3(b)). Congress, too, has always understood the anti-cutback rule to preclude amendments that indirectly affect accrued benefits. See S. REP. NO. 98-575, at 27 (describing the anti-cutback rule prior to passage of REA and explaining that "for purposes of determining whether a participant's accrued benefit is decreased, all of the provisions of the plan affecting directly *or indirectly* the accrued benefit are taken into account") (citing Rev. Rul. 81-12, 1981-1 C.B. 228) (emphasis added).

cludes the terms and conditions under which benefits will be paid.

Thus, the anti-cutback rule protects, among other things, "provisions relating to years of service and breaks in service for determining benefit accrual, and to actuarial factors for determining optional or early retirement benefits." 26 C.F.R. § 1.411(d)-3(b). In particular, the IRS has long held that an amendment that changes a discount rate used to calculate an unsubsidized early retirement benefit triggers the anti-cutback rule. Rev. Rul. 81-12, 1981-1 C.B. 228. But although changing a discount factor will change the monthly payment to a participant who has opted to receive his accrued benefit in the form of an unsubsidized early retirement benefit,[18] the *accrued benefit* to which the participant is entitled in such situation remains the value of his or her benefit "expressed in the form of an annual benefit commencing at *normal* retirement age" (ERISA § 3(23)(A) (emphasis added)), which by definition will not change when the discount rate used to calculate an *alternative* to that normal retirement benefit is changed. Thus, a change in the discount rate has no effect – and at the very least has no direct effect – on the value of the participant's accrued benefit under ERISA. Nonetheless, the IRS acknowledges that applying an amendment increasing a discount rate to accrued benefits is strictly forbidden by the anti-cutback rule.

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[18] Unsubsidized early retirement benefits entail a smaller monthly payment than normal retirement benefits because the monthly payment is reduced to take into account the increased amount of time such benefits will be paid. For example, a hypothetical participant who is expected to live until age 78 will on average receive a string of benefit payments for 13 years if he retires at age 65, but for 23 years if he retires at age 55. See LANGBEIN & WOLK, PENSION & EMPLOYEE BENEFIT LAW 447-448.

5. ERISA § 204(g)(2)(B), 29 U.S.C. § 1054(g)(2)(B), which stresses that a plan amendment that eliminates a previously available "optional form of benefit" violates the anti-cutback rule, is yet further evidence of the scope of the accrued benefit protected by the anti-cutback rule. An "optional form of benefit" is simply "a distribution form with respect to an employee's benefit ***." 26 C.F.R. § 1.411(d)-4 Q&A-1(b). But even if two optional forms of benefit are *actuarially equivalent*, the plan cannot remove one of these forms because one form may seem more valuable to a specific participant. See page 16, *supra*.

For example, at the time a participant accrued benefits, a plan might provide that retirement benefits are always paid out in either a life annuity or a joint and survivor annuity. Each of those payment options is an "optional form of benefit" that cannot be eliminated. Thus, the plan could subsequently choose to provide payment of retirement benefits in a lump sum payment option, but only by *adding* that as another option, not by eliminating the annuity options (at least with respect to benefits attributable to service before the amendment). See *Counts* v. *Kissack Water & Oil Serv., Inc.*, 986 F.2d 1322, 1324 (10th Cir. 1993). A plan cannot eliminate an "optional form of benefit" – a form of distribution of benefits specified in the plan at the time benefits accrued – even if the plan adds an alternative, actuarially equivalent method of distribution.[19]

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[19] Because the term accrued benefit "refers only to pension or retirement benefits" (26 C.F.R. § 1.411(a)-7(a)(1)(ii)), the IRS's regulations explain that "ancillary benefits not directly related to retirement benefits" are not part of the accrued benefit provided under a plan. *Ibid.* Therefore, these ancillary benefits may be changed even with respect to a participant who has accrued benefits that *are* protected by the anti-cutback rule. See 26 C.F.R. § 1.411(d)(4) Q&A-1(d). The suspension rules at issue in this case cannot be described as "ancillary," however, because they directly affect a participant's pension benefits – the payment of a specified amount of money each month.

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The point of this extended discourse should not be lost: the accrued benefits protected by the anti-cutback rule depend on the terms of the plan, but even though those accrued benefits "ordinarily [are] expressed in the form of an annual benefit commencing at normal retirement age" (*Hughes*, 525 U.S. at 440 (alterations omitted)), it is in fact the *entire* plan that describes the benefits, not merely any one narrow provision that can be plucked out of context and *called* the benefit to which the participant is entitled.

B. Because The "Accrued Benefits" Protected By The Anti-Cutback Rule Include The Terms And Conditions Affecting Payment Of Those Benefits, An Amendment May Not Alter The Terms Under Which Payment Of A Previously Accrued Benefit Is Suspended.

1. Once one understands that the "accrued benefit" protected by ERISA § 204(g) is more than simply the entitlement to a specific amount of money per month during the period when payments are made – but instead includes the various "conditions" under which that benefit will be available (26 C.F.R. § 1.411(d)-4 Q&A-7), as well as terms of the plan that "indirectly" affect the benefit (26 C.F.R. § 1.411(d)-3(b)) – this becomes a simple case. It is beyond cavil that a plan A, under which one is entitled to $1000 per month for the remainder of one's life, is worth more than a plan B, under which one is entitled to $1000 per month except in any month in which one accepts post-retirement employment in job category X, which in turn is worth more than a plan C, under which one is entitled to $1000 per month except in any month in which one accepts post-retirement employment in

job categories X or Y. While it might be difficult to determine the exact valuation of these three distinct benefits – because the second and third involve conditional events whose possibility is unknown and may be difficult to estimate – there is no question about their *comparative* worth.

This truism can best be demonstrated by fleshing out the above, as in the following hypothetical example:

PLAN	FORMULA	VALUE OF BENEFIT
A	$1000/month * the participant's estimated lifespan measured in months (300 months).	$1,000/month * 300 months: **$300,000**
B	$1000/month * the participant's estimated lifespan * a discount factor based on the estimated probability that he or she will decide to work in job X for some number of months and to forgo benefit payments in those months (0.07).	$1,000/month * 300 months * (1-0.07, or 0.93): **$279,000**
C	$1000/month * the participant's estimated lifespan * a discount factor based on the estimated probability that he or she will decide to work in job X (0.07) or in job Y (0.06) for some number of months and to forgo benefit payments in those months.	$1,000/month * 300 months * (1-(.07+.06), or 0.87): **$261,000**

Obviously, these numbers are hypothetical, and this table significantly oversimplifies the task of calculating the actuarial value of these three benefit plans (as we have ignored the time-value of money, as well as other variable and contingent events that would go into the calculation). But these are merely details; the bottom line is that, *however* these values are estimated, Plan A necessarily would be more valuable to a participant than Plan B, which would necessarily be more valuable to a participant than Plan C.

If these three hypothetical benefits are worth different amounts, then a plan amendment that changes the benefit available to a plan participant from A to B to C obviously "decreases" the value of the participant's accrued benefit (ERISA § 204(g)(1)), and, where the benefits involved are early retirement benefits or retirement-type subsidies, such amendment "has the effect of * * * reducing" the participant's previously accrued benefits (ERISA § 204(g)(2)(A)).[20] There is no functional difference between such an amendment and an amendment that removes a COLA provision, changes an actuarial factor, or adds an objective condition to a benefit calculation.[21]

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[20] It also "has the effect of * * * eliminating an optional form of benefit" (ERISA § 204(g)(2)(B)), in that a participant is entitled to receive benefits as a monthly annuity *with the condition* that no benefits would be paid in any month during which he worked in specified jobs. The terms of benefit payment, including the suspension rules, define the optional form of benefit that the plan provided at the time a participant's benefits accrued. See page 22, *supra*.

[21] Although, as we said above (at 12), this case turns on the question what is the benefit protected by the anti-cutback rule, the answer to our second question – *from what* are those benefits protected – also demonstrates the flaws in petitioner's argument. Not only does ERISA § 204(g) specify that an amendment that causes *any* "decrease" in accrued benefits is barred, but ERISA

2. The fact that under the IRS's regulations a plan need not adjust the actuarial value of a participant's benefit if his benefit payments are suspended *pursuant to a valid suspension provision already in the plan* (see 26 C.F.R. § 1.411(c)-1(f); see also Pet. Br. 27; U.S. Br. 23-24), in no way undercuts this argument. The actuarial value of a participant's benefits already accounts for the *possibility* that his benefits will be suspended in this circumstance; the *actual* suspension of benefit payments is an incidental detail. Thus, a participant in our hypothetical Plan B has no cause to complain when his benefits are suspended during months in which he chooses to work in job X, and is not entitled to have his future benefit payments increased in light of such suspensions. But it in no way follows that switching this participant from Plan B to Plan C does not decrease the value of the participant's accrued benefit.

Thus, almost all of the government's argument, as well as much of petitioner's argument, is aimed at a straw man: the proposition that the actual "suspension of benefit payments" is not a "reduction of benefits." See U.S. Br. 13-19; Pet. Br. 30; see also Central States Br. 5-6, SHRM Br. 11. We agree completely. See Pet. App. 12a-13a. For starters, only *amendments* are barred by ERISA § 204(g), and when a pension fund suspends benefit payments to a participant pursuant to existing plan terms there is no plan amendment involved. But it in no way "follows" (U.S. Br. 19) from this that an amendment *changing the plan's suspension rules* does not decrease a participant's accrued benefit. Neither petitioner

§ 204(g)(2) clarifies that any amendment that even "*has the effect of* * * * reducing" early retirement benefits is also precluded. *Ibid.* (emphasis added). The "has the effect of" phrase demonstrates the expansive scope of the anti-cutback rule. See *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138-139 (1990) (noting that phrase "having the effect of" is "broad" and "expansive[]").

nor the government ever explains why this should be the case; the government instead merely cites *Spacek* and Judge Cudahy's dissent below as support for that proposition. See *ibid.*

In fact, the IRS's own interpretation of the anti-cutback rule in a parallel situation demonstrates why this second step does not "follow[]." As we discussed above (at 21), under 26 C.F.R. § 1.411(d)-3(b), a plan cannot be amended to change the discount factor used to calculate unsubsidized early retirement benefits. For example, under this rule, a plan cannot increase the interest rate used to calculate actuarial equivalence (with respect to previously accrued benefits) from 4% to 5%. See Rev. Rul. 81-12, 1981-1 C.B. 228 (Example 1).[22] However, if the plan had initially been drafted to "specif[y] * * * an interest rate equal to 50% of the prime rate of a specified unrelated bank as of the date of separation," the fact that "the prime rate increases from 8% to 10% so that the interest rate used to compute actuarial equivalence changes from 4% to 5%" would not preclude the plan from using the new 5% value. *Ibid.* (Example 2). The point is that whereas in the former case, the plan was *amended* to reduce the size of benefit payments, in the latter case the exact same real-world change happened as a result of an external, variable factor that had already been included as a term of the plan.

The parallel to this case is obvious. The actual suspension of benefits, if authorized under the already-extant terms of a plan, is allowed – just as a plan can use a variable measure of the interest rate that causes a plan's discount rate to increase. But this does not mean that the plan can be *amended* to make exactly the same change. An amendment undermines one of Congress's fundamental purposes in enacting ERISA by defeating expectations in a way that previ-

[22] The higher the interest rate is, the larger the discount value is. See *ibid.*

ously authorized suspensions and previously authorized changes in interest rates would not. Such an amendment is a decrease in accrued benefits, and is forbidden by the anti-cutback rule.

It also follows that the fact that the phrases "reduce benefits" and "suspend benefit payments" are used in conjunction in several provisions of ERISA (see Pet. Br. 31; Central States Br. 5; see also *Spacek*, 134 F.3d at 288-289) is simply irrelevant. Once one understands that it is a fallacy to view the actual failure to send a benefit check in any given month *pursuant to a preexisting plan provision permitting such a suspension* to be a "reduction of benefits," there is nothing odd about providing that a plan in serious financial trouble could either suspend benefit payments or reduce benefits or both.

3. There is no dispute that Messrs. Heinz and Schmitt's early retirement benefits are "accrued benefits" as that term is used in ERISA (see J.A. 21 (Answer ¶ 16)), and that the Plan provided that those benefits would be suspended if they took jobs as construction laborers, but would not be suspended if they took jobs as construction supervisors. The 1998 amendment adding this second category of disqualifying employment therefore decreased their benefits, by reducing the value of those benefits and by eliminating a previously available "optional form of benefit."

Petitioner is of course correct in stressing (at Pet. Br. 18) that ERISA did not generate any expectation on the part of respondents that they would have the opportunity to seek post-retirement employment as construction supervisors. Rather, it was *the plan itself* that created this expectation.

In *theory*, a pension plan might be drafted specifically to provide that the suspension rules that apply to previously accrued benefits could be expanded at a later date. Under such a rule, a later amendment *in fact* expanding the scope of disqualifying employment would not be a reduction in

accrued benefits, because the true value of the benefits provided under the plan should always have been adjusted based on the *possibility* of such future amendment. But this theoretical plan provision does not help petitioner here, for three reasons.

For starters, the plan at issue in this case did not include any such qualification. Although petitioner stresses that "[t]he Plan provides that it may be amended, and furthermore expressly states that the definition of 'disqualifying employment' may be modified" (Pet. Br. 23 (citing J.A. 23, 46, 50); see also *id.* at 19 n.4), nothing in these plan provisions authorized an amendment that decreases accrued benefits or expands the scope of disqualifying employment as it applies to previously accrued benefits. Rather, the plan specifies in no uncertain terms that although it "may be amended at any time by the Trustees, * * * *no amendment may decrease the accrued benefit of any participant*" unless the amendment falls within two irrelevant exceptions. J.A. 50 (Plan § 8.1) (emphasis added); J.A. 13 (Cplt. ¶ 10). Nothing in the other two provisions petitioner cites contradicts this straightforward limitation.[23]

Second, if a plan could contain a provision allowing the plan to be amended retroactively to reduce previously accrued benefits, the anti-cutback rule would become

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[23] The Summary Plan Description merely explains that "[t]he Trustees reserve the right to amend" the Plan. J.A. 23. And while Plan § 6.7(d)(1) requires the Plan to *notify* a participant who has returned to work and who then stops working of "any material change in the suspension rules" (J.A. 46), this provision does not itself *authorize* any amendment to those rules. Even if it were to be read to be a separate authorization for plan amendments, however, there is nothing in this provision that is inconsistent with or trumps the requirement, in Plan § 8.1, that an amendment not "decrease" the accrued benefit.

meaningless. It seems likely that all plans would add such a provision, and workers would then be left with no protection against cutbacks "authorized" by this plan provision. Any reading of the anti-cutback rule that would allow plans to opt out of that rule would render the rule a nullity.

Finally, a provision allowing the plan to alter its suspension rules at any time would be unlawful. The IRS's regulations implementing ERISA specify that benefits may not depend on "objective conditions *that are within the employer's discretion.*" 26 C.F.R. § 1.411(d)-4 Q&A-6(b) (emphasis added). Just like a plan may not condition the availability of lump-sum distributions on "the level of the plan's funded status" (*ibid.*), so too it may not condition the suspension rules at any given point on its own choice whether to expand or contract those rules.

* * * * *

Because Respondents accrued their pension benefits under a rule whereby their subsidized ("Service Only") early retirement benefits would be paid to them in any month in which they did not work as a construction *worker*, that rule is part of the benefit protected by the anti-cutback rule. By changing the conditions under which they are entitled to receive their benefit payments, petitioner decreased their accrued benefit and violated ERISA § 204(g).

II. ERISA § 203(a)(3)(B) DOES NOT AUTHORIZE THE AMENDMENT OF A PLAN TO EXPAND THE TYPES OF POST-RETIREMENT EMPLOYMENT UNDER WHICH PREVIOUSLY ACCRUED PENSION BENEFITS MAY BE SUSPENDED.

Despite petitioner's protestations to the contrary, nothing in ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B) – or in its Internal Revenue Code counterpart, IRC § 411(a)(3)(B) – authorizes a plan to reduce a participant's accrued benefits by *amending the plan* to expand the types of post-retirement

employment under which those benefits are suspended. In fact, a careful reading of the plain text of ERISA § 203(a) demonstrates that this statutory provision is completely irrelevant to this litigation. And, on balance, neither the regulatory materials implementing ERISA nor the statute's legislative history supports petitioner's argument. Thus, even were ERISA § 203(a) ambiguous, which it is not, the IRS's interpretation of that provision would be due no deference.

A. ERISA § 203(a)(3)(B) Has No Relevance To This Case, As It Does Not Apply To Early Retirement Benefits.

As we discussed above, it is a foundational principle of ERISA that it is up to the parties to a plan to determine what benefits are offered under that plan. See page 13, *supra*. ERISA § 203(a) creates an exception to this general rule. Under this statutory provision, pension plans must "provide that an employee's right to his normal retirement benefit [be] nonforfeitable upon the attainment of normal retirement age." *Ibid.* Thus, once a participant reaches normal retirement age and commences receiving his or her normal retirement benefit, the plan is legally obligated to continue to pay that benefit "unconditional[ly]." ERISA § 3(19), 29 U.S.C. § 1002(19); see also U.S. Br. 11.

Petitioner and its *amici* stress an exception to the nonforfeitability rule, which they claim is relevant to this case. Under ERISA § 203(a)(3)(B), plans may "provide[] that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits," in specified jobs.[24] Because ER-

[24] For multiemployer plans, the payment of benefits may be suspended for subsequent employment "in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced." ERISA

ISA § 203(a)(3)(B) is merely a subsection to the nonforfeitability rule contained in ERISA § 203(a) – which protects normal retirement benefits payable after normal retirement age – it must be read as part of that overarching section. See, *e.g.*, *Smith* v. *United States*, 508 U.S. 223, 233 (1993) ("[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute").

Thus, this provision creates a legislative exception to the nonforfeitability rule. In other words, without this provision no plan would be *allowed* to suspend the payment of normal retirement benefits for *any* post-normal-retirement-age reemployment. This provision both *authorizes* such suspensions and *limits* the forms of post-retirement reemployment under which a plan may suspend the payment of benefits.

However, because ERISA § 203(a) protects only *normal* retirement benefits payable after normal retirement age, it is well established that subsection 203(a)(3)(B) has no relevance to the terms under which a plan chooses to provide a subsidized *early* retirement benefit. In fact, that is how the IRS itself interprets the statute. The regulations implementing this subsection explain that:

> A plan may provide for the suspension of pension benefits which commence prior to normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for *any* reemployment and *without regard to the provisions of section 203(a)(3)(B)* and this regulation * * *.

§ 203(a)(3)(B)(ii). For other plans, benefits may be suspended for subsequent employment "by an employer who maintains the plan." *Id.* § 203(a)(3)(B)(i), 29 U.S.C. § 1053(a)(3)(B)(i).

29 C.F.R. § 2530.203-3(a).[25] In other words, nothing in ERISA § 203(a)(3)(B) limits the forms of suspension rules that a plan can include for participants who retire before normal retirement age. Therefore, plans can, if they choose, specify that *any* post-retirement work will cause the plan to suspend the payment of subsidized early retirement benefits.[26]

But this authority to exceed the limits contained in ERISA § 203(a)(3)(B) for early retirement benefits has a flip side. If ERISA § 203(a)(3)(B) does not limit the forms of suspension rules a plan can include for benefits payable prior to normal retirement age or for subsidized early retirement benefits, so too it cannot be the authority for a plan to contain such rules in the first place. And if ERISA § 203(a)(3)(B) is not the statutory authority for such rules to exist, it also follows that it cannot be statutory authority for the proposition that a plan can *change* an existing suspension rule applicable to early retirement benefits.

Thus, despite the extensive attention petitioner and its *amici* give to ERISA § 203(a)(3)(B), that provision is simply irrelevant to this case. Rather, suspension rules applicable to benefits payable prior to normal retirement age, or to the sub-

[25] To prevent a plan from indirectly violating ERISA § 203(a)'s non-forfeitability rule, the regulation clarifies that this is the case only "to the extent * * * that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." 29 C.F.R. § 2530.203-3(a).

[26] In fact, a recent amendment to the plan in this very case provides that, for participants who retire before age 53, benefit payments attributable to benefits accrued after the date of that amendment, September 30, 1998, will be suspended for "employment which results in *any type of compensation* for services rendered." J.A. 64 (Amendment 7 to Plan § 6.7(c)(1)(ii)) (emphasis added).

sidized portion of early retirement benefits payable at any age – and thus the suspension rules applicable to respondents' benefits in this case – are authorized under the general rule that, absent a specific limitation in ERISA, the parties to a plan can draft whatever rules they see fit. See page 13, *supra*. Such plan provisions, however, may only be amended to the extent the amendment does not violate the anti-cutback rule. See ERISA § 204(g); Part I, *supra*.

B. Even If ERISA § 203(a)(3)(B) Were Relevant To This Case, This Statutory Provision Does Not Authorize A Plan To Amend Its Suspension Rules With Respect To Previously Accrued Benefits.

1. Nothing In The Text of ERISA § 203(a)(3)(B) Suggests That An Amended Suspension Rule Can Apply To Previously Accrued Benefits.

Even if ERISA § 203(a)(3)(B) were relevant to this litigation, petitioner and its *amici* misinterpret it. Under this subsection, a plan may "provide[]" a suspension rule for post-retirement reemployment. However, nothing in the language of this subsection authorizes a plan to *change* or *amend* the suspension rule originally "provide[d]" in the plan. See *Lamie* v. *U.S. Trustee*, 124 S. Ct. 1023, 1030 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'") (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (in turn quoting prior case law)).

To begin with, as a textual matter the statutory term – "provide" – does not suggest that the trustees of a plan can change a previously existing suspension rule. "Provide" means "to *make* a proviso or stipulation." WEBSTER'S THIRD NEW INT'L DICTIONARY 1827 (1986) (definition 2) (emphasis added); see also OXFORD ENGLISH DICTIONARY 713 (2d ed. 1989) (definition 2.c) ("[t]o make it, or lay it down as, a

provision or arrangement; to stipulate *that*") (emphasis in original); AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) (definition 3) ("[t]o *set down* as a stipulation") (emphasis added). Thus, ERISA § 203(a)(3)(B) by its terms allows the initial drafters of a plan to include – to "make" or "set down" – a suspension rule; this subsection does not, however, authorize the trustees of a plan to amend – *re*-provide, as it were – those suspension rules once they have originally been "ma[d]e."[27]

A related example will clarify the point. ERISA § 203(a)(3)(A), 29 U.S.C. § 1053(a)(3)(A), which is statutorily parallel to ERISA § 203(a)(3)(B), allows a plan to "provide[]" that a participant's benefits will not be payable "if the participant dies." Because of this provision, plans may provide that "a participant who dies before retiring receives no benefits." LANGBEIN & WOLK, PENSION AND EMPLOYEE BENEFIT LAW 135. However, if a plan were to offer its participants the choice between a life annuity and an actuarially equivalent alternative "optional form of benefit," in which benefits would be paid to the participant or the participant's estate for exactly 15 years (cf. 26 C.F.R. § 1.411(d)-4 Q&A-1(b)(2) (Example 1)), no one would argue that, based on ERISA § 203(a)(3)(A), the plan could cease paying benefits to the estate of a participant who chose the 15-year annuity but who died in year six. That would not be the form of payment to which the participant agreed.[28] Nor

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[27] Throughout its brief, petitioner asserts that ERISA § 203(a)(3)(B) allows a plan to "adopt" a suspension provision. See Pet. Br. 11, 15, 16, 17, 21. That is not the statutory term. In any event, nothing about the word "adopt" implies that a plan could modify – *re*-adopt – an already existing suspension rule.

[28] Note that, although ERISA § 203(a)(3)(A) makes an exception to the forfeitability rule for "a survivor annuity which is payable as provided in § 205 [29 U.S.C. § 1055]" (*ibid.*), the fixed-term annuity described in the text is not the "Qualified Joint and Survivor

would anyone argue that the plan could be *amended* to authorize the cessation of these monthly payments, even though ERISA § 203(a)(3)(A) allows a plan to "provide[]" that benefits be forfeited when the participant dies.

But there is no difference between an amendment seeking to use ERISA § 203(a)(3)(A) to change the terms of payment of a participant's accrued benefit and an amendment using ERISA § 203(a)(3)(B) to change the terms of payment of that benefit. ERISA § 203(a)(3)(A) allows plans to "provide[]" for benefits to terminate at death, but does not authorize a plan to change the rules as to previously accrued benefits. Similarly, the parallel ERISA § 203(a)(3)(B) allows plans to "provide[]" for suspension rules, but does not authorize those rules to be changed with respect to previously accrued benefits. Therefore, under a straightforward textual analysis of the statute, petitioner's argument must be rejected.

2. The Structure Of ERISA As A Whole Undermines Petitioner's Argument.

Turning to ERISA as a whole, nothing about the structure of the statute implies that ERISA § 203(a)(3)(B) *should* be the authority for a plan's trustees to amend a suspension rule. See *Smith*, 508 U.S. at 233 ("a single provision of a statute" "cannot be read in isolation"). Rather, authority for all plan amendments comes from ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), which requires any plan subject to ERISA to "provide a procedure for amending such plan." The *types* of amendments that may be made under ERISA § 402(b)(3), however, are limited in various ways by the remainder of the

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Annuity" defined in ERISA § 205. An ERISA § 205 annuity is one that lasts until both the participant and his or her spouse have died. See ERISA § 205(d)(1). Therefore, the fixed-term annuity described in the text is protected only because it is the form of payment to which the parties agreed.

statute. In particular, the applicability of amendments to previously accrued benefits is limited by ERISA § 204(g). *See* Part I, *supra*. ERISA § 203(a)(3)(B) is *also* a limit on amendments, of course; because of this provision a plan could not be amended – even for newly accrued benefits – to provide that normal retirement benefits paid after normal retirement age would be suspended for all forms of post-retirement employment. See page 31 & note 24, *supra*. But the only logical reading of the statute as a whole is that ERISA § 203(a)(3)(B) contains certain restrictions on plan provisions, and ERISA § 204(g) contains *other* restrictions on plan provisions. Any provision added or modified by a plan amendment must satisfy both of these subsections, as well as many other specific requirements specified in various parts of ERISA. Thus, although a plan can be amended to include more restrictive suspension rules, those new rules cannot be applied to previously accrued benefits. See Pet. App. 10a n.6.

In fact, as the government noted in its brief, "ERISA's benefit-accrual rules, set forth in Section 204 of the Act" are "'doctrinally distinct'" from its "vesting rules, set forth in Section 203 of the Act." U.S. Br. 10-11 (quoting LANGBEIN & WOLK, PENSION AND EMPLOYEE BENEFIT LAW 122). It would make little structural sense to expect the suspension rule contained in ERISA § 203(a)(3)(B), which addresses vesting, to be a limitation on the anti-cutback rule, which involves benefit accruals.

3. Administrative Materials Interpreting ERISA §§ 203(a)(3)(B) And 204(g) Contain Conflicting Interpretations Of These Provisions, And Do Not Warrant Departing From The Plain Text Of The Statute.

Although petitioner, and the government as *amicus*, point to various IRS and Department of Labor administrative materials that they assert interpret ERISA § 203(a)(3)(B) to au-

thorize the amendment at issue in this case (see Pet. Br. 17-18; U.S. Br. 23-27), the majority of these materials in fact provide no support whatsoever for that argument.

For example, 29 C.F.R. § 2530.203-3(a) (cited at Pet. Br. 18) implements ERISA § 203(a)(3)(B), but merely reiterates that a plan can "*provide*[] that the payment of benefits" be suspended in specified circumstances. *Ibid.* (emphasis added). It does not address when the plan must so "provide," and whether, once the plan does so provide, the suspension provision may be changed.

Similarly, 26 C.F.R. § 1.411(c)-1(f) and the various IRS publications explaining it (cited at Pet. Br. 27; U.S. Br. 23-24) are equally unhelpful to petitioner. Under this regulation, "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] § 203(a)(3)(B)." 26 C.F.R. § 1.411(c)-1(f). But as we have already explained, this regulation merely clarifies that the true actuarial value of an accrued benefit *already includes* the possibility that benefit payments will be suspended in the situations specified in that plan. Therefore, this regulation does not suggest that a plan can expand the scope of disqualifying employment with respect to previously accrued benefits. See page 26, *supra*.

The "Listing of Required Modifications" ("LRM") discussed by the government (at U.S. Br. 25-26) likewise offers no support to petitioner's argument. As the cover page to that manual explains, the IRS issued it "to assist sponsors who are *drafting or redrafting* plans," by publishing "samples of plan provisions that have been found to satisfy certain specific requirements of the Internal Revenue Code." Internal Revenue Service, *Defined Benefit Listing of Requirement Modifications and Information Package*, cover page (2000) (*available at* http://www.irs.gov/pub/irs-tege/db_lrm.pdf) (emphasis added) (quoted at U.S. Br. 25). However, the authors of the LRM are quick to stress in that very same introductory paragraph that the sample provisions in the LRM "may or may not be acceptable in different plans *depending on the context in which used*." *Ibid.* (emphasis added). Furthermore, nothing in the relevant section of the document (LRM 55, at 109-111) says *anything* about a suspension provision being added to an already existing plan, or discusses to what benefits such newly added provisions could apply.

The final regulatory item cited by petitioner and the government (see Pet. Br. 27; U.S. Br. 26) – Internal Revenue Manual ("IRM") § 4.72.14.3.5.3(7) (*available at* http://www.irs.gov/irm/part4/ch47s19.html) – does, it is true, offer limited support for their argument. According to the IRM, "[a]n amendment that reduces [accrued] benefits on account of 203(a)(3)(B) service does not violate [the Internal Revenue Code parallel to ERISA § 204(g)]." But in this instance the IRM is entitled to little or no deference from this Court.

Neither petitioner nor the government claim that the IRM is due *Chevron* deference. See Pet. Br. 27-28; U.S. Br. 26-27. Rather, under *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001), this regulation is due deference to the extent it has the power to persuade. See *ibid.*; Pet App. 22a n.17. But there is no *reasoning* whatsoever given in the IRM. In situations involving *Skidmore* deference, conclusory statements do not have persuasive value; one of the main justifications for *Skidmore* deference is the "'validity of [an agency's] *reasoning*.'" *Mead Corp.*, 533 U.S. at 228 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)) (emphasis added).

Furthermore, the IRM also *undermines* petitioner's argument. In the IRM, the IRS notes – as we discussed above (at 32-33) – that under ERISA § 203(a) "receipt of protected benefits *other than the normal retirement benefits* may be conditioned on the participant's not performing *any* type of reemployment." IRM § 4.72.14.3.5.3(7) (emphasis added). However, the IRM provides that a plan may only include

such a blanket suspension rule "if the provision is present in the plan *from its establishment*." *Ibid.* (emphasis added). In other words, the IRS acknowledges that an amendment expanding the scope of disqualifying employment must, at least in certain circumstances, be viewed to be a prohibited reduction of benefits.[29] In its *amicus* brief, however, the government spends many pages disputing the notion that the suspension of benefit payments can *ever* decrease the value of an accrued benefit. See U.S. Br. 13-19; see also Pet. Br. 28-29.

In sum, nothing in the regulations or administrative guidance issued under ERISA § 203(a)(3)(B) or § 204(g) should persuade this Court to ignore the plain text of those statutes. While there is one conclusory and unreasoned statement in an IRS manual consistent with petitioner's position, that statement is unsupported, is not due deference under *Chevron*, and is outweighed by other regulatory positions that undermine petitioner's argument.

4. The Legislative History On Which Petitioner And Its *Amici* Rely Does Not Help Their Argument.

Petitioner and its *amici* also rely heavily on legislative history to support their argument, but these materials, too, are largely irrelevant.

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[29] Under this portion of the IRM, an amendment expanding the suspension rule for subsidized early retirement benefits payable before normal retirement age to authorize suspension for *any* post-retirement reemployment would violate the anti-cutback rule. It is presumably for this reason that when the Fund implemented its any-employment-is-suspending rule in 1998, that new rule applied only to benefits accrued after the date of that amendment. See note 26, *supra*.

a. For starters, the vast majority of the legislative history on which petitioner and its *amici* focus addresses an uncontroversial point: that there are good reasons why the authors of a multiemployer plan should be allowed to include a suspension rule *in the first place*. Suspension rules allow a plan "'to protect participants against their pension plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of, employees covered by the plan.'" Pet. Br. 23 (quoting III ERISA LEGIS. HIST. 4738 (statement of Sen. Williams)); see also Pet. Br. 23-24 ("Congress intended to 'protect unions against undercutting of wage scales and the additional expense generated by the need to subsidize retirement benefits for those who have left the work force as well as retirement benefits for those continuing to work.'") (quoting III ERISA LEGIS. HIST. 4772 (statement of Sen. Javits)); U.S. Br. 15 (collecting legislative history to same effect); Nat'l Coord. Comm. Br. 12-13 (collecting legislative history to same effect).

Critically, none of this legislative history has *anything* to do with the question presented in this litigation: whether, in a situation where a plan initially chose not to include a suspension rule at all, or initially chose to limit that suspension rule to a subset of the types of disqualifying employment that it could have specified to be disqualifying, that plan should later be allowed to *change* its rule with respect to previously accrued benefits.

b. Petitioner and its *amici* also focus on Representative Clay's explanation of the REA amendment to ERISA § 204(g), which clarified that the anti-cutback rule applies to early retirement benefits as well as normal retirement benefits (see page 4, *supra*). See Pet. Br. 34; U.S. Br. 22. This floor statement, too, is off point. Representative Clay said only that the new provision being added to ERISA § 204(g) did not "affect the provision of ERISA § 203(a)(3)(B) * * * relating to the suspension of benefits for postretirement em-

ployment, including the authorization for multiemployer plans to adopt stricter rules *for the suspension of subsidized early retirement benefits*." 130 Cong. Rec. 23,487 (daily ed. Aug. 9, 1984) (emphasis added).

In other words, Representative Clay merely clarified that, in adding ERISA § 204(g)(2) to the anti-cutback rule, Congress was not eliminating the distinction drawn in ERISA § 203(a) between normal retirement benefits – which could only be suspended for specific forms of post-retirement employment (see note 24, *supra*) – and early retirement benefits or benefits payable before normal retirement age, which a plan could provide would be suspended for *any* post-retirement reemployment. See pages 32-33, *supra*; Pet. App. 16a n.11. In fact, this is one of the examples Representative Clay specifically gave immediately following the quote upon which petitioner and its *amici* so heavily rely; despite this amendment, "a multiemployer plan which contains postretirement benefit suspension rules providing for the suspension of subsidized early retirement benefits on grounds other than those described in ERISA section 203(a)(3)([B]) * * * (as authorized by existing law) remains free to apply those rules." 130 Cong. Rec. 23,487-23,488 (statement of Rep. Clay).

c. In fact, the only piece of legislative history that petitioner or any of its *amici* could dredge up that even *arguably* supports petitioner's argument is one floor statement by Representative Dent made while Congress was debating whether to enact ERISA. See Pet. Br. 21-22; U.S. Br. 15-16; Nat'l Coord. Comm. Br. 13-14. On August 22, 1974, Representative Dent stated that

> the conferees expressly provided in Section 203(a)(3)(B) that a plan be permitted to suspend benefits under certain circumstances. This section further authorizes the Secretary to prescribe regulations necessary to carry out the purposes of this provision.

> It is contemplated that those regulations would permit a plan's provisions concerning suspension to take into account the particular facts and circumstances of the industry; the objectives of industrial stability; the conditions of employment and earnings in the industry; the benefit payment period of the plan; and the burden of onerous and costly administrative procedures imposed upon the plan by these provisions.

120 Cong. Rec. 29,192, 29,197 (daily ed. Aug. 22, 1974) (*reprinted at* III ERISA LEGIS. HIST. 4669-4670).

This statement can be read multiple ways. For example, it is an entirely plausible reading of this speech to interpret Representative Dent merely to be comparing the needs of different industries and explaining that plans in these different industries might want to implement different suspension rules. Under this reading of Representative Dent's statement, nothing about his comments suggests that he had even considered the question whether a plan's suspension rules may be amended retroactively.

But even if this one ambiguous floor statement is read to imply that Representative Dent believed suspension rules could be amended retroactively, it is an insupportably thin reed on which to base petitioner's entire case, and is not nearly enough evidence to warrant rejecting the plain import of the actual *text* of the statute. This Court recently rejected a similar statutory-interpretation argument based on "two sentences contained within 472 pages of written statements" in a statute's legislative history. *Lamie*, 124 S. Ct. at 1034. What this Court said in *Lamie* is equally true here: "Nothing in the legislative history confirms that this particular point bore on the congressional deliberations or was given specific consideration. These uncertainties illustrate the difficulty of relying on legislative history * * * and the advantage of * * * [basing a decision] on the statutory text." See also, *e.g.*, *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 457 n.15 (2002) (rejecting

"placing an obligation on Members of Congress * * * to monitor their colleague's floor statements"); *Garcia* v. *United States*, 469 U.S. 70, 76 & n.3 (1984) ("In surveying legislative history we have * * * eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.") (citations omitted); 2A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 48:15 (6th ed. 2000) ("Isolated remarks by the sponsor of a bill that are ambiguous are not sufficient to demonstrate congressional intent.").

5. The Policy Arguments Raised By Petitioner And Its *Amici* Are Misguided.

Petitioner and its *amici* spend many pages explaining why plans *should* be allowed to modify suspension rules retroactively to compensate for changing market conditions and a plan's financial health. See Pet. Br. 21-26; U.S. Br. 28-29; Central States Br. 4; Nat'l Coord. Comm. Br. 12-20. Although these policy justifications have no legal significance, there are nonetheless at least six responses to them.

First, it is again critical to distinguish between the policy arguments made for why suspension rules might be a good idea – such as to prevent members of a multiemployer plan from "retiring" and immediately resuming identical employment in a non-union job paying less than the union jobs covered by the plan, or to prevent "double dipping" – and any policy justification for allowing a plan to change its rules retroactively. See page 41, *supra*. Petitioner and its *amici* repeatedly try to conflate the two questions.

Second, the flip side to these arguments is that plan participants justifiably rely on the terms of their plans as those plans existed when their benefits accrued.[30] Suspension rules

[30] In fact, a Department of Labor regulation at least implicitly demonstrates this. Under that regulation,

affect the value of retirement benefits to plan participants, and therefore are negotiated in detail. When a plan changes its rules retroactively it is simply reneging on its collectively bargained contractual obligation to its participants.[31]

Third, ERISA already contains provisions under which employers *may* retroactively amend their suspension rules, when they face "substantial business hardship." See ERISA § 302(c)(8), 29 U.S.C. § 1082(c)(8); U.S. Br. 28 n.9.[32] This escape hatch exists specifically for those instances where a pension fund might not otherwise be able to fulfill its obliga-

> [i]f a plan provides for benefits suspension, the plan shall adopt a procedure * * * whereunder an employee may request, and the plan administrator in a reasonable amount of time will render, a determination of whether specific contemplated employment will be section 203(a)(3)(B) service for purposes of plan provisions concerning suspension of benefits.

29 C.F.R. § 2530.203-3(b)(6). In other words, before retiring a plan participant can ask – and the participants in this case *did* ask – whether a specific post-retirement job would lead to the suspension of benefits payments. This underscores the fact that participants may decide whether to retire at least in part based on whether they can take specific post-retirement employment.

[31] Relatedly, the argument that all plans would immediately implement the most restrictive suspension rules possible if this Court were to hold that the anti-cutback rule precludes a plan from retroactively amending its suspension rules (see Pet. Br. 26; U.S. Br. 29; Nat'l Coord. Comm. Br. 27) has no basis. Rather, these rules are a subject of concern to employees and thus employees may negotiate to include liberal reemployment rules in their plans. Furthermore, "employers have incentives to offer attractive benefit plans because of their role in attracting workers, improving morale, and increasing employee retention." Giannotti, *supra*, 68 U. CHI. L. REV. at 1366.

[32] In this case, petitioner did not seek to amend its plan under the "substantial business hardship" rules. See Pet. App. 7a.

tions. See, *e.g.*, *Shaw*, 750 F.2d at 1465 (rejecting argument that a plan should be allowed to remove a COLA provision unilaterally because of financial distress, but noting that the plan "can now submit its discussion of financial hardship, *which is irrelevant to our decision*, to the Secretary [of Labor]" under the hardship rules) (emphasis added). Except for instances of financial hardship that fit within ERISA § 302(c)(8), the very choice to create a defined-benefit plan rather than a defined-contribution plan entails the *conscious decision* that the plan (and the employers who fund it) may be subjected to additional financial burdens if some prediction – for example, expected rates of return of the fund's investments in the market or, as in this case, the number of employees who will choose to accept early retirement – turns out to be wrong. See *Hughes Aircraft*, 525 U.S. at 439. Thus, although these hardship rules may be used only when a plan is in substantial financial distress (see U.S. Br. 28 n.9), it made perfect sense for Congress to choose to place the reliance interests of plan participants above a plan's desire to make retroactive amendments in all but extreme cases.[33]

Fourth, it is simply not the case that allowing plans to amend their suspension rules only with respect to newly accrued benefits will leave them powerless to respond to changing market conditions.[34] It will make it more difficult,

---

[33] In any event, an amendment expanding limitations on post-retirement reemployment is unlikely to protect the financial well-being of a pension plan because under such an amendment participants are still entitled to retire and collect their pensions. Even under the amended version of the plan at issue in this litigation, Messrs. Heinz and Schmitt are entitled to receive their pensions merely by choosing to stop working altogether, or even simply by going to work in an unrelated industry. See Pet. Br. 19.

[34] Nor is it the case – contra U.S. Br 29; Nat'l Coord. Comm. Br. 28 – that it would be an administrative nightmare were this Court to hold that new suspension rules apply only to benefits accrued after the enactment of such amendment. As we discussed above, the plan in this case *already has* certain suspension rules that apply only to benefits accrued after the date those suspension rules were enacted. See note 26, *supra*.

to be sure, but the prospective tightening of these rules will certainly have some impact. Furthermore, there is nothing preventing a plan from amending its rules retroactively to *reduce* the number of situations in which payments may be suspended. Thus, if the employer-sponsors of a plan felt a pressing need for more workers, the trustees of that plan could use such an amendment to encourage previously retired participants to return to the job market. Cf. Pet. Br. 23.

Fifth, neither the fact that respondents' early retirement benefit is subsidized, nor the fact that they accepted early retirement at the age of 39, justifies allowing the plan to punish them by forbidding them from accepting previously authorized post-retirement employment. Respondents did *exactly* what the plan allowed them to do at the time they retired, and, as we have repeatedly explained, it is up to the parties to a plan to decide what benefits are available under that plan. One cannot fault a participant in a plan for choosing an option authorized by the plan.

Finally, it is important to recognize that "normal retirement age" is a legal fiction. As the leading authority on ERISA has explained, it is merely one of a number of variables used to calculate participants' accrued benefits, rather than any indication of the age at which participants to a plan will, in fact, "normal[ly]" retire. See LANGBEIN & WOLK, PENSION AND EMPLOYEE BENEFIT LAW 445 (citing DAN M. MCGILL & DONALD S. GRUBBS, JR., FUNDAMENTALS OF PRIVATE PENSIONS 129-131 (6th ed. 1989)). In its *amicus* brief in this case, the National Coordinating Committee for Multiemployer Plans explained that early retirement is in fact common in the construction industry because "[c]onstruction

work is physically hard, and is often performed under harsh climatic conditions." Nat'l Coord. Comm. Br. 10 (quoting 144 Cong. Rec. 7574, 7578 (daily ed. July 7, 1998) (statement of Sen. D'Amato)). Thus, the fact that respondents retired at an early age under the subsidized early retirement pension offered by the Fund is understandable; it seems quite likely that a significant percentage of participants in the Fund do so as well. The sponsors of the plan presumably expect – or should expect – to pay subsidized early retirement benefits to many plan participants, and the existence of such benefits therefore must be accounted for in setting the level of a participant's "normal" retirement benefit in the first place. To allow the Fund to change the rules in mid-course would unfairly shift the risk of plan funding deficits from the plan's sponsors to participants in that plan.

* * * * *

The Seventh Circuit's interpretation of the anti-cutback rule is the only one that comports with the policies of ERISA. ERISA § 204(g) forbids amendments that decrease the value of an accrued benefit, which is exactly what the Fund's amendment did in this case. Because nothing in ERISA § 203(a)(3)(B) in any way allows what ERISA § 204(g) forbids, the court of appeals' decision is plainly correct.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted.

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ADDENDUM

1. ERISA § 3, 29 U.S.C. § 1002, provides:

DEFINITIONS.

For purposes of this subchapter:

* * *

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in [ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under [ERISA § 204(c)(2)(B), 29 U.S.C. § 1054(c)(2)(B)] with respect to the employee's accumulated contribution.

2. ERISA § 203, 29 U.S.C. § 1053, provides:

MINIMUM VESTING STANDARDS.

(a) Nonforfeitability Requirements. – Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

* * *

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in [ERISA § 205, 29 U.S.C. § 1055]).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

3. ERISA § 204, 29 U.S.C. § 1054, provides:

BENEFIT ACCRUAL REQUIREMENTS.

* * *

(c) Employee's Accrued Benefits Derived From Employer And Employee Contributions.

* * *

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

* * *

(g) Decrease Of Accrued Benefits Through Amendment Of Plan.

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in [ERISA § 302(c)(8), 29 U.S.C. § 1082(c)(8) or ERISA § 4281, 29 U.S.C. § 1441].

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

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IN THE
Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief demonstrated that ERISA's "anti-cutback" rule does not prohibit pension plans from adopting disqualifying employment provisions that expand the circumstances in which payments on previously accrued benefits will be suspended. Respondents do not undermine that showing, which is consistent with the long-standing practice of the government and the decisions of the courts of appeals prior to the opinion below. Those authorities recognize that the principle that "ERISA provides an employer with broad authority to amend a plan" (*Hughes Aircraft Co.* v. *Jacobsen*, 525 U.S. 432, 442 (1999)) applies in this circumstance, for (as respondents' concede) the Suspension Provision does not "decrease" their "benefits" but instead merely suspends the payment of those benefits during the period that respondents elect to engage in disqualifying employment.

I. The Suspension Provision Does Not Violate The Principle That Plan Participants Are Entitled To Receive Promised Pension Benefits.

1. Respondents assert that "plan participants justifiably rely on the terms of [plans' suspension provisions] as those plans existed when their benefits accrued" (Br. 44), such that "[w]hen a plan changes its rules retroactively it is simply reneging on its collectively bargained contractual obligation to its participants" (*id.* 45). That argument misstates the expectations conferred by ERISA. There is no indication in ERISA's text or legislative history that Congress intended to confer on participants an expectation that they would have the right to retire, claim a pension, and return to work in the same industry and location in competition with other plan participants to secure a second income. To the contrary, respondents concede that petitioner is "correct in stressing that ERISA did not generate any expectation on the part of respondents that they would have the opportunity to seek post-retirement employment as construction supervisors." Br. 28.

To be sure, ERISA confers on participants expectations regarding their pension benefits. But it does so principally through the "vesting" rules of Section 203(a), which provide that pension rights are nonforfeitable – *i.e.*, may not be conditioned – *except* to the extent provided by statute, including in Section 203(a)(3)(B). *E.g.*, *Varity Corp.* v. *Howe*, 516 U.S.

489, 496 (1996) (ERISA protects benefits by, *inter alia*, "specifying certain plan characteristics in detail (such as when and how pensions vest)"), *cited in* Resp. Br. 2. Respondents read too much into this Court's statement that, in ERISA, "Congress wanted to * * * mak[e] sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain *a vested* benefit – he actually will receive it." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 375 (1980) (emphasis added), *quoted in* Resp. Br. 3, 9, 12. The very point of the exceptions included in the vesting rules is to provide that in certain cases a vested benefit will *not* be paid. Thus, although a plan may not generally suspend payments on vested benefits, it may do so under the specific circumstances set forth in Section 203(a)(3)(B) and its implementing regulations.

With respect to post-retirement employment, it is accordingly *Section 203(a)(3)(B)* that both defines participants' reasonable expectations and ensures that plans do not unreasonably interfere with the availability of participants' pensions. Respondents concede that Section 203(a)(3)(B) "both *authorizes* such suspensions and *limits* the forms of post-retirement reemployment under which a plan may suspend the payment of benefits." Br. 32 (emphases in original).

Our opening brief explained, and respondents concede, that a plan participant has complete control over whether benefit payments are suspended and, if so, for how long. Respondents acknowledge that under the plan amendment at issue here they "are entitled to receive their pensions merely by choosing to stop working altogether, or even simply by going to work in an unrelated industry." Br. 46 n.33. See also BIO 14 n.10. The Suspension Provision thus does not interfere with participants' ability to receive their pensions.[1]

Moreover, with respect to unsubsidized early retirement benefits and normal retirement benefits, suspension of the benefit payments of a multiemployer plan participant is permitted only for employment in the same industry, trade, and geographic area as the plan. ERISA § 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii). The plan provision at issue, for example, applies only to employment in the construction trade in central Illinois. See Pet. Br. 20. Benefits derived from the participant's own contributions are furthermore always inviolate. ERISA § 203(a)(1), 29 U.S.C. 1053(a)(1).[2]

[1] Suspension is permitted only "for such period as the employee is employed," not for a longer period. ERISA § 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B).

2. Precisely because they overstate the expectations conferred and protected by ERISA, respondents misstate the genuine expectations of participants and pension plans. No plan participant could reasonably have believed that the definition of disqualifying employment would remain static forever. Indeed, the relevant federal regulatory agencies have provided for *decades* that Section 203(a)(3)(B) permits plans to adopt stricter definitions of disqualifying employment applicable to previously accrued benefits. See U.S. Br. 23-27. The two courts of appeals that considered the question before this case agreed. *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (CA5 1998); see also *Whisman* v. *Robbins*, 55 F.3d 1140 (CA6 1995). And the Plan in this case both provided that it could be amended (see J.A. 50 (Plan § 8.1)) and also specifically contemplated that existing retirees who return to work could be subject to a "material *change* in the suspension rules" (*id.* 46 (Plan § 6.7(d)(1)) (providing for notice of such a change) (emphasis added)).

The nation's pension plans have long relied on their authority to apply revised disqualifying employment provisions to already accrued benefits. In prosperous times, plans have provided that benefit payments would not be suspended for various forms of reemployment. The plans took that generous approach precisely because they were confident that suspension rules could later be changed – to protect the interests of plan participants who did not have both a pension and further employment – should conditions worsen. Put another way, the Plan provided that the benefit payments of participants such as respondents would be suspended for work as construction laborers (but not as supervisors) only because it knew that it could impose a broader suspension provision – within the limits of Section 203(a)(3)(B) and its implementing

[2] Participants' interests are also protected by the fact that multiemployer employer plans are administered by a board of trustees composed equally of representatives of management and labor. See 29 U.S.C. 186(c)(5)(B).

regulations – if circumstances later changed in the central Illinois construction market or in the Plan's financial condition.

A decision of this Court abrogating pension plans' settled understanding of the authority conferred by Section 203(a)(3)(B) would have startling and potentially devastating consequences. Respondents' "cutback" argument is directed *not* at the suspension of their own benefit payments; they concede that such a suspension does not decrease their benefits. See *infra* at 14. Instead, they contend that the Plan, by expanding the forms of employment triggering suspension, violated the rights of *all* of the thousands of participants who had previously accrued benefits. They thus assert that it is the change in the rules governing suspension, not the suspension itself, that impermissibly "reduces the value" of all participants' benefits and amounts to a prohibited cutback. That proposition, if accepted, threatens to impose massive retroactive liability on both already distressed pension plans (which, having relied on the government's guidance that amendments to suspension provisions were permitted, would face exceptional liability) and their contributing employers (which would be in jeopardy of having their pension contributions deemed non-tax-exempt). Respondents' statement that their position "merely renders the plan *unqualified* for favored tax treatment" (Br. 11 n.7 (emphasis in original)) fails to appreciate the potential consequences of their theory.

Finally, respondents' position would, ironically, disadvantage most plan participants, even if respondents themselves would personally benefit. That reality is presumably why several of the nation's leading labor organizations have joined the *amicus* brief filed by the National Coordinating Committee for Multiemployer Plans in support of petitioner. If prohibited from adapting to current circumstances by applying a more stringent definition of disqualifying employment to already accrued benefits, pension plans would have no prudent choice but to define disqualifying employment as broadly as possible from the outset and maintain that position even in times of labor scarcity. To be sure, as respondents note, "there is nothing preventing a plan from amending its rules retroactively to *reduce* the number of situations in which payments may be suspended" to, for example, "encourage previously retired participants to return to the job market." Br. 47 (emphasis in original). Respondents thus contend that

Section 203(a)(3)(B) operates as a one-way ratchet – one that can only expand to the immediate benefit of current retirees, and that cannot contract as needed to further the interests of all participants. But as a practical matter, a plan would rarely amend its suspension provision to expand participants' rights to return to the workforce while receiving pension benefits if, when conditions changed, the plan were powerless to revert to its prior suspension rule. Respondents' position would thus produce a result that worked to the detriment of participants who in the future sought to return to the workforce without triggering a suspension of their benefit payments.[3]

II. The Suspension Provision Is Authorized By ERISA Section 203(a)(3)(B).

Our opening brief established that the Suspension Provision is valid because, as the ERISA regulatory authorities have concluded, Section 203(a)(3)(B) authorizes the adoption

---

[3] In a footnote, respondents assert that, because "these rules are a subject of concern to employees," "employees may negotiate to include liberal reemployment rules in the plans" or employers will do so voluntarily to "'attract[] workers, improv[e] morale, and increas[e] employee retention.'" Br. 45 n.31 (quoting Ameri R. Giannotti, Comment, *ERISA's Anticutback Rule And Contingent Early Retirement Benefits*, 68 U. CHI. L. REV. 1341, 1366 (2001)). That is not correct. Multiemployer plans in particular generally encompass all union employers in a trade in a particular region; competition between plans or between employers with respect to plan terms is very limited.

Moreover, respondents ignore the well-established delineation between the roles of bargaining parties and the roles of multiemployer plan trustees set forth in Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), and explained by the Court in *NLRB* v. *AMAX Coal Co.*, 453 U.S. 322 (1981); see also Goetz, *Developing Federal Labor Law and Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 922 (1970) ("The governing trust agreement separately entered into by the parties to the collective bargaining agreement may specify general categories of benefits, but it normally delegates to the trustees broad discretion to determine specific benefit levels and eligibility requirements, to modify the benefit plan, and to administer the plan." (footnote omitted)). To suggest that employee representatives and their employer counterparts negotiate the scope of a pension plan's suspension rules is thus simply wrong.

of employment disqualification provisions that apply to the payment of all benefits. Pet. Br. 16-26. Respondents' brief fails to undermine that conclusion.

A. The Seventh Circuit's Decision Cannot Be Reconciled With The Statutory Text Or The Purposes Underlying Its Enactment.

1. Section 203(a)(3)(B) authorizes a plan to "provide[] that the payment of benefits is suspended for such period as the employee, subsequent to the commencement of payment of such benefits," is employed in certain capacities. This provision, on its face, authorizes the suspension of *all* payments that otherwise would be made during the period of reemployment, not merely payment of benefits that accrued after the suspension provision was adopted. The Department of Labor regulation implementing Section 203(a)(3)(B) – promulgated pursuant to the statutory directive to "carry out the purposes of this subparagraph" (ERISA § 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B)) – likewise draws no such distinction. See 29 C.F.R. 2530.203-3(a); Pet. Br. 17-18; SHRM Br. 15 n.23 ("this regulation was developed over a three year period based upon the Department of Labor's considered review of the text of the statute, the legislative history and numerous public comments on the proposed and final regulations" (collecting citations)). The IRS, in turn, has adopted the regulation for purposes of the parallel provisions of the Internal Revenue Code. See 26 C.F.R. 1.411(a)-4(b)(2); Pet. Br. 18.[4]

Indeed, there is no actual dispute that Section 203(a)(3)(B) and the implementing regulations apply to already accrued benefits. As noted *supra* at 4-5, respondents agree that a plan amendment may *narrow* the definition of disqualifying employment so as to make the suspension of payments on previously accrued benefits *less* likely. Because the statute thus necessarily confers the authority to reach payments attributable to already accrued benefits, there is no basis for reading into Section 203(a)(3)(B) a restriction that is nowhere suggested by its text – *viz.*, that a plan may provide for the suspension of benefit payments except to the extent that the plan provision makes the suspension of payments on previously accrued benefits *more*, rather than *less*, likely.

[4] Respondents' statement that the regulation was itself promulgated by the IRS (Br. 32) is incorrect.

2. Section 203(a)(3)(B)'s purpose reinforces its plain meaning and the agencies' long-standing construction. There is no real dispute that the statute will be hobbled if this Court accepts the holding of the majority below. Respondents can only assert that their position will not leave plans "*powerless* to respond to changing market conditions," although "[i]t will make it more difficult, to be sure." Br. 46-47 (emphasis added). The "prospective tightening of [suspension] rules," they maintain, "will certainly have *some* impact." *Id.* 47 (emphasis added). Perhaps, but Section 203(a)(3)(B)'s ability to accomplish Congress's intent would be undercut severely.

As our opening brief explained (at 21-26), a principal purpose of employment disqualification provisions authorized by Section 203(a)(3)(B) is to adjust to shorter-term shifts in labor markets and financial conditions. The *amicus* brief of the National Coordinating Committee for Multiemployer Plans details the relatively rapid shifts in local conditions that regularly confront plans, for "[d]eep and frequent fluctuations between periods of high and low unemployment are commonplace in the industries in which multiemployer plans predominate." NCCMP et al. Br. 15.[5]

Employment disqualification provisions will fulfill their purpose of adjusting to current circumstances only if they apply to already accrued benefits. "For suspension of benefit provisions to be effective over time, multiemployer plans must have the flexibility to expand the scope of disqualifying employment when economic conditions warrant, in order to maintain actuarial soundness and to protect the interests of actual retirees and active non-retired participants." NCCMP et al. Br. 6. Necessarily, a plan provision reducing or enhancing the prospect of suspension must apply to the payments of existing retirees' benefits if it is to influence those retirees' decisions whether to return to or leave the workforce. By

[5] For example, in the years prior to the Suspension Provision's adoption, construction employment in central Illinois fell by 10% and then rebounded. See Ill. Dep't of Empl. Sec., *at* http://lmi.ides.state.il.us/cesfiles/ilceshis.htm (last visited Apr. 5, 2004) (data for 1990 (224,000 jobs), 1992 (202,000), and 1994 (215,000)). During the rebound, the Plan adopted a more lenient definition of disqualifying employment; it adopted the Suspension Provision when its financial status worsened. See Pet. Br. 6-7.

definition, the benefits of existing retirees have already accrued. Respondents' construction would render employment disqualification provisions ineffective until many years after their adoption, by which time circumstances almost certainly will have changed. It is extremely unlikely that Congress would have gone to the trouble of enacting Section 203(a)(3)(B) only to have it operate so ineffectually.

For their part, respondents dispute the validity of using employment disqualification as a means of ever protecting plan assets. "[T]he very choice to create a defined-benefit plan rather than a defined contribution plan," they maintain, "entails the *conscious decision* that the plan (and the employers who fund it) may be subjected to additional financial burdens if some prediction * * * turns out to be wrong." Br. 46 (emphasis in original). That is no answer to the value of employment disqualification provisions in encouraging or discouraging retirees to return to the workforce. But in any event, Section 203(a)(3)(B)'s very existence demonstrates that Congress rejected respondents' view that plans must stand idly by as their financial situation deteriorates. The dispute in this case is *not* (as respondents' argument suggests) over whether the tool of employment disqualification can be used to adapt to existing financial circumstances (it indisputably can), but rather whether the power conferred by Section 203(a)(3)(B) should be read so narrowly that it becomes essentially ineffective by precluding pension plans from adapting their suspension provisions to current circumstances.[6]

B. The Question Presented Is Properly Resolved By Reference To Section 203(a)(3)(B).

1. Respondents hope to avoid the foregoing by asserting that Section 203(a)(3)(B) is "completely irrelevant to this litigation" (Br. 31) – a "maze of distracting and inapposite technicalities" to which petitioner and the United States have erroneously "devote[d] endless attention" (*id.* 9-10). Respondents' assertions are unfounded. Section 203(a)(3)(B), not

[6] Respondents also contend that plans can use ERISA Section 302(c)(8)'s "escape hatch," which allows plans to reduce benefits in cases of "substantial business hardship." Br. 45. But that provision does not contradict petitioner's reading of Section 203(a)(3)(B), as it applies "only when the plan is on the verge of insolvency." U.S. Br. 28 n.9 (citing 29 U.S.C. 1083(b)(4)).

Section 204(g), is the provision of ERISA that directly addresses the question presented by this case. Section 203(a)(3)(B) authorizes pension plans to adopt suspension provisions. Respondents' position is that the authority of plans is constrained – *i.e.*, that plans may not adopt provisions which increase the likelihood that payments on already accrued benefits will be suspended. The most natural place in which Congress would have imposed such a restriction is in the text of Section 203(a)(3)(B) itself.

ERISA's structure confirms that conclusion. Respondents acknowledge that "'ERISA's benefit-accrual rules, set forth in Section 204 of the Act' are 'doctrinally distinct' from its 'vesting rules, set forth in Section 203 of the Act.'" Br. 37 (quoting U.S. Br. 10-11). The accrual rules specify how participants *earn* benefits. But ERISA does not require a plan to pay out all accrued benefits.[7] Rather, the vesting rules determine the point at which a plan must *pay* those earned benefits. Specifically, Section 203 determines when a participant's right to receive benefits becomes "nonforfeitable" – *i.e.*, "unconditional." ERISA § 3(19), 29 U.S.C. 1002(19). Thus, the question presented by this case is most naturally regarded as one of benefit vesting, not benefit accrual.

2. Respondents assert, however, that "subsection 203(a)(3)(B) has no relevance to the terms under which a plan chooses to provide a subsidized *early* retirement benefit." Br. 32 (emphasis in original). From that premise, they derive the "flip side" that Section 203 cannot be the "authority for the proposition that a plan can *change* an existing suspension rule applicable to early retirement benefits." *Id.* 33 (emphasis in original). Although respondents characterize their assertion that Section 203(a)(3)(B) does not apply to early retirement benefits as "well established" (Br. 32), they cite *no* authority adopting that construction. Both the Fifth and Seventh Cir-

[7] For example, a participant who has accrued benefits but has only four years of vesting service before incurring a permanent break in service (see ERISA Section 203(b)(3)) will not be entitled to receive that benefit if the plan uses a five-year cliff vesting schedule. Likewise, in accordance with ERISA Section 203(a)(3)(A), the accrued benefit earned by an unmarried participant who has worked 40 years in employment covered by the plan but dies prior to retirement need never be paid by the plan.

cuits have held that Section 203(a)(3)(B) does, in fact, apply. See Pet. App. 6a; *Spacek*, 134 F.3d at 290 & n.8.

Respondents misread the statute because they focus exclusively on the introductory language of Section 203(a) providing that "an employee's right to his *normal* retirement benefit is nonforfeitable upon the attainment of *normal* retirement age" (emphases added). See Br. 31. They ignore the critical language immediately thereafter: the plan "in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection." Paragraphs (1) and (2), as well as subsection (a)(3)(B), are *not* limited to normal retirement benefits, but instead expressly apply to "accrued benefits," a term that ERISA defines to include early retirement benefits.[8]

For defined benefit plans, the statute thus defines an "accrued benefit" as the "accrued benefit defined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. 1002(23)(A). Section 204(c)(3), 29 U.S.C. 1054(c)(3), in turn, states that "if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, * * * the employee's accrued benefit * * * shall be the actuarial equivalent of such benefit or amount." In other words, in the context of early retirement benefits, the "accrued benefit" protected by Section 203(a) is expressed as an unsubsidized early retirement benefit (the actuarial equivalent of the retiree's normal retirement benefits). The Department of Labor regulation implementing Section 203(a) (29 C.F.R. 2530.203-3(a)) confirms that the statute covers early retirement benefits; it provides that Section 203(a)(3)(B) applies *in full* to unsubsidized early retirement benefits and *in part* to subsidized early retirement benefits. Contra Resp. Br. 3 n.2, 32-33.[9]

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[8] Section 203(a) is reproduced in relevant part in the Appendix, *infra*, at 1a-4a.

[9] Specifically, suspension of the former is permitted only if the conditions of Section 203(a)(3)(B) are satisfied; suspension of the latter is permitted only for "reemployment" (as opposed to, for example, activity disloyal to the employer). The regulation thus provides that suspension is permitted for any reemployment "only to the extent[] that suspension of such benefits does not affect a retiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." 29 C.F.R. 2530.203-3(a). Contra Resp. Br. 33 n.25.

3. Finally, focusing on the fact that Section 203(a)(3)(B) authorizes a plan to "'provide[]' a suspension rule for post-retirement reemployment," respondents assert that "nothing in the language of this subsection authorizes a plan to *change* or *amend* the suspension rule originally 'provide[d]' in the plan." Br. 34 (alterations and emphases in original). Respondents explain that "provide" "means 'to *make* a proviso or stipulation'" (*ibid.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1827 (1986) (emphasis in Resp. Br.)), and argue on that basis that "§ 203(a)(3)(B) by its terms allows the initial drafters of a plan to include – to 'make' or 'set down' – a suspension rule; this subsection does not, however, authorize the trustees of a plan to amend – *re*-provide, as it were – those suspension rules once they have originally been 'ma[d]e.'" *Id.* 35 (alterations and emphases in original).

This is not a serious argument. The default rule is that ERISA permits plan amendments. ERISA § 402(b)(3), 29 U.S.C. 1102(b)(3). Section 203(a)(3)(B), in authorizing plans to "provide" for employment disqualification, equally authorizes a plan to "make" such a provision in the original plan or in an amendment; it does not limit when the provision must be adopted. When Congress intended in Section 203 to limit the power to adopt amendments, it did so expressly. Section 203's vesting provisions have their *own* anti-cutback rule, which circumscribes plans' authority to adopt amendments that modify participants' vesting schedules, but which does not impose *any* limitation on amendments relating to the suspension of benefit payments. See ERISA § 203(c), 29 U.S.C. 1053(c), discussed further *infra* at 14-15.

On respondents' contrary reading, employment disqualification provisions were effectively frozen in place decades ago. Thus, according to respondents, revised provisions could not even be applied to the payment of benefits that accrue in the future. Even the Seventh Circuit rejected that view. Pet. App. 10a-11a n.6. Respondents seem to be confusing the plan's authority to *adopt an amendment* with the distinct question whether that amendment may be *applied* to already accrued benefits.

Indeed, respondents abandon their own argument. They state that "although a plan *can be amended* to include more restrictive suspension rules, those new rules cannot be applied to previously accrued benefits" (Br. 37 (emphasis added)). And as discussed *supra* at 4-5, respondents themselves emphasize that "there is nothing preventing a plan from amending its rules retroactively to *reduce* the number of situations in which payments may be suspended." *Id.* 47. Indeed, respondents are suing to enforce a previously *amended* disqualification provision. They simply ignore that, if Section 203(a)(3)(B) only authorizes provisions adopted as of the plan's enactment, such an amendment would be forbidden.

III. The Suspension Provision Does Not Violate Section 204(g) Because It Does Not Decrease Benefits.

ERISA Section 204(g) prohibits a plan amendment that "decrease[s]" a participant's "accrued benefit." Respondents abandon all pretense of contending that the act of *suspending* their benefit *payments* itself decreased their benefits. Instead, they contend that the Plan's mere *adoption* of the Suspension Provision was prohibited with respect to any plan participant whose benefits had previously accrued. Respondents offer an "extended discourse" (Br. 23) intended to establish the critical legal premise of their argument: that "the 'accrued benefits' protected by the anti-cutback rule include all the terms and conditions that affect the value of those benefits" (*id.* 12 (heading) (capitalization omitted)). On that basis, respondents contend that "because the suspension terms are part of Messrs. Heinz and Schmitt's accrued benefits, they, too, are protected by the anti-cutback rule." *Id.* 13-14.[10]

[10] Respondents vacillate between two theories of how the Suspension Provision decreases the "value" of their benefits. They say that "the opportunity to work in specific jobs while receiving benefits is plainly a valuable right" (Br. 9), but also contend that "[i]t is beyond cavil" that their benefits were "worth more" before the adoption of the Suspension Provision imposed a further condition on their receipt of benefit payments, apparently because they believe that the "real world" value of a life annuity is reduced if more conditions are attached to it. *Id.* 23. As we discuss *infra*, Section 204(g) neither protects an "opportunity to work" nor forbids otherwise lawful plan amendments that adversely affect the non-actuarial value of benefits.

Respondents err in their premise that Section 204(g) prohibits any amendment adding any condition affecting the value of benefits, and for that reason they mistakenly conclude that the Suspension Provision is unlawful. The statute nowhere refers to the "value" of a benefit in the sense that respondents use that term – *i.e.*, the benefit's "desirability," in contrast to its actuarial value. Regulations recently promulgated by the IRS to implement the Internal Revenue Code provision that parallels Section 204(g) thus describe a prohibited "decrease" in benefits as one that renders "the net *dollar amount* of the early retirement *annuity* * * * lower." 69 Fed. Reg. 13,769, 13,770 (Mar. 24, 2004) (emphases added). And the regulations define a "reduction" as a "reduction in the *amount*" of the benefit. *Id.* at 13,782 (emphasis added).

Assuming *arguendo* that Section 204(g) in some instances prohibits the imposition of "conditions" on already accrued benefits, it does so *not* because a "condition" relating to benefits is *itself* a protected "accrued benefit." Rather, it prohibits plans from cutting back benefits both directly and indirectly. Just as an amendment violates Section 204(g) if it directly decreases the amount of an accrued benefit or eliminates a protected "form of benefit," so too an amendment is prohibited if it adds a condition that, if triggered, would have those consequences. This is not such a case: if a participant triggers the condition imposed by the Suspension Provision by electing to return to work in the construction industry in central Illinois, the consequence is not a decrease in benefits but instead a suspension of benefit payments. Just as a plan may suspend benefit payments pursuant to Section 203(a)(3)(B) without triggering Section 204(g) (a fact respondents concede), so too it may adopt a condition that, if triggered, has as its only consequence such a suspension.

A. Petitioner's Reading Of Section 204(g) Is Supported By The Text And By The Consistent View Of The Relevant Regulatory Authorities.

1. ERISA, on its face, precludes respondents' argument that the "accrued benefit" protected by the anti-cutback rule includes the "conditions" on the benefit. The statute defines an "accrued benefit" (i) as the benefit "determined under the plan," that is (ii) "expressed in the form of an annual benefit commencing at normal retirement age" (ERISA § 3(23), 29 U.S.C. 1002(23)) or an early retirement benefit (ERISA

§ 204(c)(3), 29 U.S.C. 1054(c)(3)). See *supra* at 10. The Plan in this case, like all pension plans of which we are aware, defines the accrued benefit in financial terms. Specifically, it includes one provision addressing participants' "Eligibility" (J.A. 38 (Plan § 3.13)) and another addressing the "Amount" of the benefit (*ibid.* (Plan § 3.14)). Neither provision speaks to the suspension of benefit payments.

With respect to "Amount," the Plan defines the benefit on respondents' "Service-Only Pension": "The monthly amount of the Service-Only Pension is the same as the Regular Pension prior to any adjustment for payment in the form of a Husband-and-Wife Pension." J.A. 38 (Plan § 3.14). The Regular Pension, in turn, provides for a "monthly amount" "equal to the sum of: (a) $4.11 for each Pension Credit based on work in Covered Employment prior to January 1, 1965, plus (b) an amount for each Pension Credit earned during the Contribution Period in accordance with [a] schedule [set out in the Plan]." App., *infra*, at 11a (Plan § 3.4).

The amendment in question thus did not "decrease" respondents' defined "benefit." To be sure, while respondents have chosen to continue to work as construction supervisors, the Plan has continued to withhold their monthly checks. But that temporary "suspension" of their benefit "payments" is authorized by Section 203(a)(3)(B) (see *supra* Part II) and is not a benefit decrease. Respondents' defined benefit remains the same now as before the suspension, and payments on that benefit will resume as soon as they elect to leave disqualifying employment. See generally Pet. Br. 5, 28. Respondents thus *concede* that the withholding of payments does not "decrease" their "benefits," and "agree completely" that "the actual 'suspension of benefit payments' is not a 'reduction of benefits.'" Br. 26. They further concede "that the phrases 'reduce benefits' and 'suspend benefit payments'" have distinct meanings "in several provisions of ERISA." *Id.* 28.

An example furthermore demonstrates that respondents cannot be correct in asserting that a plan amendment which is authorized under Section 203 but which decreases the "value" of participants' benefits violates the anti-cutback rule. Respondents' position would gut plans' power, conferred in ERISA Section 203(c), to change their vesting schedules. 29 U.S.C. 1053(c), reproduced *infra* at App. 4a-5a. For example, a plan may substitute a rule providing for 100% vesting upon

five years of service (so-called "cliff vesting," see Section 203(a)(2)(A)) in place of a prior rule under which benefits vested incrementally over the course of seven years (see Section 203(a)(2)(B)). In that circumstance, Section 203(c) authorizes employees with at least three years of service to choose between the two vesting schedules; employees with less service have no such option. Yet under respondents' reading of Section 204(g)'s categorical bar, such a change would be prohibited for all employees because it would decrease the "value" of the accrued benefits of participants (who would lose the valuable rights that had vested to that point). The change would be forbidden both for employees with more than three years of service and for newer employees (who have no right under Section 203(c) to object to the change). But Congress explicitly authorized such an amendment under Section 203(c) notwithstanding Section 204(g).

2. Both the relevant regulatory materials and "[t]wo decades of regulatory practice" (U.S. Br. 7) refute respondents' reading of Section 204(g). "For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" *Mead Corp.* v. *Tilley*, 490 U.S. 714, 726 (1989).

The IRS has provided that "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under § 203(a)(3)(B)." 26 C.F.R. 1.411(c)-1(f). "It follows from that conclusion that a plan amendment permitting the suspension of benefit payments under Section 203(a)(3)(B) likewise would not result in a reduction of benefits prohibited by Section 204(g)." U.S. Br. 6. If the actual *suspension* (pursuant to which money is withheld) does not decrease the benefit, there is no basis for concluding that the *prospect* of suspension constitutes a decrease.

Respondents disagree. They assert that the point of this regulation is that "[t]he actuarial value of a participant's benefits already accounts for the *possibility* that his benefits will be suspended in this circumstance; the *actual* suspension of benefit payments is an incidental detail." Br. 26 (emphases in original). That is not correct. There is no support in ERISA, its regulations, or the Plan for the assertion that the actuarial value of a participant's benefit changes based on either the

suspension of benefit payments or the prospect of suspension. Respondent is confusing the "net present value" or "perceived value" of a benefit with the "actuarial value," which is a technical term. For example, when the Plan in 1994 adopted a less restrictive disqualifying employment provision to encourage participants to return to the workforce, the actuarial value of their benefits remained unchanged. Nor did the actuarial value increase when the Plan liberalized its suspension rules. Instead, the Plan defines a benefit's "Actuarial Present Value" by reference to a Mortality Table and using a set interest rate. See App., *infra*, at 9a-10a (Plan § 1.22).

Petitioner's position is also supported by the provisions of the Internal Revenue Manual (IRM) – the official document used to review multiemployer pension plans – interpreting Internal Revenue Code Section 411(d)(6), which parallels Section 203(a)(3)(B). Issued after notice and comment (U.S. Br. 26), the IRM provides that an amendment such as the one at issue here "does *not* violate IRC 411(d)(6)." IRS Multiemployer Plan Examination Guidelines 4.72.14.3.5.3(7) (May 4, 2001) (emphasis added). See U.S. Br. 26-27. Respondents admit that the IRM embraces petitioner's position, but assert that it "is entitled to little or no deference" because it states a conclusion, rather than setting out the IRS's reasoning. Br. 39. The IRM is concise because it provides instructions to IRS employees, who do not need an explanation. Further, respondents never explain what more the IRS would be required to say: they *concede* that the suspension of benefit payments does not reduce benefits (see *supra* at 14); and the statute on its face precludes the assertion that an "accrued benefit" includes a right "to work in specific jobs" (see *supra* at 14).[11] Deference is further due the IRM because it reflects

[11] Respondents err in asserting that "the IRM provides that a plan may only include * * * a blanket suspension rule 'if the provision is present in the plan *from its establishment*.'" Br. 39-40 (quoting IRM § 4.72.14.3.5.3(7)) (emphasis in Resp. Br.). Although the IRM states that such a provision is authorized if included in the plan "from its inception," it does *not* state that such a provision is authorized "only" in that instance. In any event, respondents' quote from the IRM is not relevant here because it deals only with plan provisions providing for suspension of benefit payments upon "any reemployment." By contrast, the challenged plan

the IRS's decades-long practice, as reflected by the List of Required Modifications the IRS has long provided to plans. See U.S. Br. 8, 26; *Alaska Dep't of Envt'l Conservation* v. *EPA*, 124 S. Ct. 983, 1001 (2004) ("We 'normally accord particular deference to an agency interpretation of "longstanding" duration.'" (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002)).

B. Respondents' Contrary Arguments Under Section 204(g) Lack Merit.

Despite this substantial authority contrary to their reading of Section 204(g), respondents assert that their position is "uncontroversial" and "beyond any reasonable doubt" (Br. 13) in light of two regulations implementing the anti-cutback rule, two statutory provisions, and two lines of cases. In fact, the authorities cited by respondents reaffirm the basic distinction Congress drew in ERISA between a prohibited decrease in benefits and a permitted suspension of benefit payments.

1. Respondents cite two regulations, both of which are reproduced in relevant part in the Appendix, *infra*, at 6a-8a, and neither of which addresses the suspension of benefit payments. Respondents would derive from the regulations the principle that "the anti-cutback rule protects all aspects of [protected] benefits – including conditions related to their payment." Br. 15. And they assert that the rationale underlying the regulations must be that "because the addition of these conditions decreases the *real-world* value of a participant's accrued benefit, such conditions violate the anti-cutback rule." *Id.* 16 (emphasis in original).

Preliminarily, respondents ignore that their position founders on the rejection of their reading by the IRS, which issued the regulations and has long approved amendments that change the terms of employment disqualification provisions. U.S. Br. 26. The IRS's actual position is codified in the IRM, discussed *supra* at 16-17.

The IRS's position is furthermore correct, for the regulations cited by respondents are inapposite. The first provides that a plan amendment may not adopt a condition that, if not satisfied by the participant, will eliminate the benefit. 26

provision here authorizes suspension under the conditions set out in ERISA Section 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B)(ii).

C.F.R. 1.411(d)-4; see Resp. Br. 14-18. Specifically, it addresses two questions (both omitted from respondents' brief): "May a plan condition the *availability* of a Section 411(b)(6) protected *benefit* on the satisfaction of objective conditions that are specifically set forth in the plan?" (Q&A-6); and "May a plan be amended to add employer discretion or conditions restricting the *availability* of a Section 411(b)(6) protected *benefit*?" (Q&A-7). *Ibid.* (emphases added). The regulation states that new objective conditions on the availability and form of benefits are permissible if applied to benefits that accrue in the future but not if applied to previously accrued benefits. *Ibid.* The Suspension Provision, by contrast, is not a condition on the "availability" of the "benefit" but relates only to the suspension of benefit payments, which respondents correctly concede is an entirely distinct concept. Thus, each respondent's benefit remains the same no matter whether he engages in disqualifying employment. See *supra* at 14-16.

The second regulation provides that an amendment may not adversely change how benefits are computed. 26 C.F.R. 1.411(d)-3(b); see Resp. Br. 20-21. Specifically, it provides that, in "determining whether or not any participant's accrued benefit is decreased," the IRS will look to "all the provisions of a plan affecting directly or indirectly the *computation* of accrued benefits." *Ibid.* (emphasis added). Thus, a plan amendment may not change the "provisions relating to years of service and breaks in service for determining benefit accrual" (26 C.F.R. 1.411(d)-(3)(b)), which are critical factors for determining whether benefits accrue. Nor may a plan amendment adversely change the "actuarial factors for determining optional or early retirement benefits" (*ibid.*) – *i.e.*, the means of calculating the amount of the benefit. Again, the Suspension Provision does not directly or indirectly affect the *computation* (*i.e.*, amount) of accrued benefits. Rather, it relates only to the suspension of the benefit payment.

2. Respondents next cite two statutory provisions. First, ERISA Section 204(c)(3), 29 U.S.C. 1054(c)(3), provides that "if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age * * * the employee's accrued benefit * * * shall be the actuarial equivalent of such benefit." See Br. 14. This provision – which is discussed *supra* at 10 – is straightforward: the benefit accrued by employees who take early

retirement is the "actuarial equivalent" of their normal retirement benefit. For example, for a person retiring at age 39, the actuarial equivalent of a normal retirement benefit of $1000 a month would be approximately $100. This actuarial equivalent would still be expressed as "a specified amount of money" or at least "a formula." Contra Resp. Br. 14.

Second, respondents note that a provision of the anti-cutback rule added in 1984 separately forbids a plan from "eliminat[ing] a previously available 'optional form of benefit.'" Resp. Br. 22 (quoting ERISA § 204(g)(2)(B), 29 U.S.C. 1054(g)(2)(B)). But Congress's adoption of such a special rule actually undercuts their argument. The elimination of a form of a normal retirement benefit clearly reduces the "real world value" of a benefit and would be prohibited under respondents' reading of the anti-cutback rule as originally enacted. Yet Congress found it necessary to adopt the separate "optional form of benefits" provision. On respondents' view that every adverse change in the "value" of benefits is a prohibited "decrease" in "benefits," the optional form of benefit provision would be surplusage.[12]

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[12] The "optional form of benefit" provision explains why respondents err in relying on a regulation stating that a plan may not add a condition that, if not satisfied, would eliminate the availability of "a lump-sum distribution" of previously accrued benefits. Br. 16 (citing 26 C.F.R. 1.411(d)-4 Q&A-7). Although a change in the form of distribution (from, for example, a lump sum payment to a life annuity) would have "no actuarial effect on the dollar value of the benefits provided" (*ibid.*), the condition is forbidden because, if triggered, it would eliminate the "form of benefit" separately protected by Section 204(g)(2)(B).

Respondents have waived their assertion that the Suspension Provision *itself* "'has the effect of * * * eliminating an optional form of benefit.'" Br. 25 n.20 (quoting ERISA § 204(g)(2)(B), 29 U.S.C. 1054(g)(2)(B)). They did not make this argument below and assert it here only briefly in a footnote. In any event, as the regulation cited in the text explains, a protected "form of benefit" is a method of distributing the benefit, as distinct from a rule defining when payments on the benefit will be suspended.

In a footnote, respondents also recognize that the anti-cutback rule applies only to "'a participant who satisfies (either before after the amendment) the preamendment conditions for'" a subsidized benefit. Br. 15 n.10 (quoting ERISA § 204(g)(2), 29 U.S.C. 1054(g)(2)). As respondents explain, this provision requires that a

3. Respondents finally invoke two lines of cases. First, decisions hold that "contingent benefits that may never be paid are protected by the anti-cutback rule." Resp. Br. 16. Respondents give as an example "certain forms of 'plant shutdown' benefits" under which "a participant is entitled to a subsidized early retirement benefit commencing at the time of shutdown" (*id.* 16 & n.11). These cases simply hold that an earned benefit provided by the benefit formula, even if contingent, cannot be eliminated.

Second, decisions hold that "cost of living adjustment[s]" (COLAs) are protected by the anti-cutback rule. Resp. Br. 18. The plan provisions at issue in these cases provide that a benefit will be adjusted upward in line with, for example, the consumer price index, such that the COLA is part of the formula for calculating the amount of the benefit. The cases simply hold that the formula may not be changed, and the benefit amount decreased, to the participant's detriment.

In sum, because the "anti-cutback rule" of ERISA Section 204(g) does not prohibit plans from adjusting conditions that will trigger the suspension of benefit payments under Section 203(a)(3)(B), the judgment should be reversed.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's opening brief, the judgment should be reversed.

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plan "allow participants to 'grow into'" such a benefit. *Ibid.* That rule is not implicated by this case. Respondents indisputably have accrued a subsidized early retirement benefit; there is nothing more for them to "grow into." The only issue is whether the suspension of benefit payments under Section 203(a)(3)(B) amounts to a "decrease" of those benefits under Section 204(g).

Respectfully submitted,

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ERISA Section 203, 29 U.S.C. 1053. Minimum vesting standards

(a) Nonforfeitability requirements. Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) Except as provided in paragraph (4), a plan and satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
3.....	20
4.....	40
5.....	60
6.....	80
7 or more	100.

(3)

(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 205 [29 USCS § 1055]).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits

is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 302(c)(8) [29 USCS § 1082(c)(8)].

(D) (i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 204(c)(2)(C) [29 USCS § 1054(c)(2)(C)]) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 204(c)(2)(C) [29 USCS § 1054(c)(2)(C)] (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of

separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before the date of the enactment of this Act [enacted Sept. 2, 1974], a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before the date of the enactment of this Act [enacted Sept. 2, 1974] if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after the date of the enactment of this Act [enacted Sept. 2, 1974]. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross reference. For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 206(c) [29 USCS § 1056(c)].

(E) (i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 4244A or 4281 [29 USCS § 1425 or 1441], or

(II) benefit payments under the plan may be suspended under section 4245 or 4281 [29 USCS § 1426 or 1441].

(F) A matching contribution (within the meaning of section 401(m) of the Internal Revenue Code of 1986 [26 USCS § 401(m)]) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under section 401(k)(8)(B) of such Code [26 USCS § 401(k)(8)(B)], an excess deferral under section 402(g)(2)(A) of such Code [26 USCS § 401(g)(2)(A)], or an excess aggregate contribution under section 401(m)(6)(B) of such Code [26 USCS § 401(m)(6)(B)].

(4) In the case of matching contributions (as defined in section 401(m)(4)(A) of the Internal Revenue Code of 1986 [26 USCS § 401(m)(4)(A)]), paragraph (2) shall be applied—

(A) by substituting "3 years" for "5 years" in subparagraph (A), and

(B) by substituting the following table for the table contained in subparagraph (B):

Years of service:	The nonforfeitable percentage is:
2.....	20
3.....	40
4.....	60
5.....	80
6.....	100.

(c) Plan amendments altering vesting schedule.

(1) (A) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) unless each participant having not less than 3 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of the Internal Revenue Code of 1986 [26 USCS § 401(a)(4)].

(3) (A) The requirements of subsection (a)(2) shall be treated as satisfied in the case of a class-year plan if such plan provides that 100 percent of each employee's right to or derived from the contributions of the employer on the employee's behalf with respect to any plan year is nonforfeitable not later than when such participant was performing services for the employer as of the close of each of 5 plan years (whether or not consecutive) after the plan year for which the contributions were made.

(B) For purposes of subparagraph (A) if—

(i) any contributions are made on behalf of a participant with respect to any plan year, and

(ii) before such participant meets the requirements of subparagraph (A), such participant was not performing services for the employer as of the close of each of any 5 consecutive plan years after such plan year, then the plan may provide that the participant forfeits any right to or derived from the contributions made with respect to such plan year.

(C) For purposes of this part, the term "class year plan" means a profit-sharing, stock bonus, or money purchase plan which provides for the separate nonforfeitability of employees' rights to or derived from the contributions for each plan year.

26 CFR 1.411(d)-4

§ 1.411(d)-4 Section 411(d)(6) protected benefits.

Q-6: May a plan condition the availability of a section 411(d)(6) protected benefit on the satisfaction of objective conditions that are specifically set forth in the plan?

A-6: (a) Certain objective conditions permissible – (1) In general. The availability of a section 411(d)(6) protected benefit may be limited to employees who satisfy certain objective conditions provided the conditions are ascertainable, clearly set forth in the plan and not subject to the employer's discretion except to the extent reasonably necessary to determine whether the objective conditions have been met. Also, the availability of the section 411(d)(6) protected benefit must meet the nondiscrimination requirements of section 401(a)(4). See § 1.401(a)-4.

(2) Examples of permissible conditions. The following examples illustrate of permissible objective conditions: a plan may deny a single sum distribution form to employees for whom life insurance is not available at standard rates as defined under the terms of the plan at the time the single sum distribution would otherwise be payable; a plan may provide that a single sum distribution is available only if the employee is in extreme financial need as defined under the terms of the plan at the time the single sum distribution would otherwise be payable; a plan my condition the availability of a single sum distribution on the execution of a covenant not to compete, provided that objective conditions with respect to the terms of such covenant and the employees and circumstances requiring execution of such covenant are set forth in the plan.

(b) Conditions based on factors within employer's discretion generally impermissible. A plan may not limit the availability of section 411(d)(6) protected benefits permitted under the plan on objective conditions that are within the employer's discretion. For example, the availability of section 411(d)(6) protected benefits in a plan may not be conditioned on a determination with respect to the level of the plan's funded status, because the amount of plan funding is within the employer's discretion. However, for example, although conditions based on the plan's funded status are impermissible, a plan may limit the availability of a section

411(d)(6) protected benefit (e.g., a single sum distribution) in an objective manner, such as the following:

(1) Single sum distributions of $25,000 and less are available without limit; and

(2) Single sum distributions in excess of $25,000 are available for a year only to the extent that the total amount of such single sum distributions for the year is not greater than $5,000,000; and

(3) An objective and nondiscriminatory method for determining which particular single sum distributions will not be available during a year in order for the $5,000,000 limit to be satisfied is set forth in the plan.

Q-7: May a plan be amended to add employer discretion or conditions restricting the availability of a section 411(d)(6) protected benefit?

A-7: No. The addition of employer discretion or objective conditions with respect to a section 411(d)(6) protected benefit that has already accrued violates section 411(d)(6). Also, the addition of conditions (whether or not objective) or any change to existing conditions with respect to section 411(d)(6) protected benefits that results in any further restriction violates section 411(d)(6). However, the addition of objective conditions to a section 411(d)(6) protected benefit may be made with respect to benefits accrued after the later of the adoption or effective date of the amendment. In addition, objective conditions may be imposed on section 411(d)(6) protected benefits accrued as of the date of an amendment where permitted under the transitional rules of § 1.401(a)-4 Q&A-5 and Q&A-8 of this section. Finally, objective conditions may be imposed on section 411(d)(6) protected benefits to the extent permitted by the permissible benefit cutback provisions of Q&A-2 of this section.

26 CFR 1.411(d)-3

§ 1.411(d)-3 Other special rules.

(b) Prohibition against accrued benefit decrease. Under section 411(d)(6) a plan is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if a plan amendment decreases the accrued benefit of any plan participant, unless the plan amendment satisfies the requirements of section 412(c)(8) (relating to certain retroactive amendments) and the regulations thereunder. For purposes of determining whether or not any participant's accrued benefit is decreased, all the provisions of a plan affecting directly or indirectly the computation of accrued benefits which are amended with the same adoption and effective dates shall be treated as one plan amendment. Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to years of service and breaks in service for determining benefit accrual, and to actuarial factors for determining optional or early retirement benefits.

Plan Section 1.22. Actuarial Present Value.

(a) For lump sum payments other than pursuant to a Qualified Domestic Relations Order, unless otherwise specified in the Plan, the "Actuarial Present Value" of a benefit shall be determined using the full set of interest rates prescribed by the Pension Benefit Guaranty Corporation for valuing annuities under single-employer plans that terminate without a Notice of Sufficiency on the first day of the Plan Credit Year in which the date as of which the benefit is valued occurs.

Notwithstanding the foregoing, if the value so calculated under the preceding subparagraph exceeds $25,000, the "Actuarial Present Value" of a lump sum benefit shall be determined using 120% of the full set of interest rates prescribed by the Pension Benefit Guaranty Corporation for valuing annuities under single-employer plans that terminate without a Notice of Sufficiency on the first day of the Plan Credit Year in which the date as of which the benefit is valued occurs.

(b) For converting the formal form of benefit to all optional forms, except pursuant to a Qualified Domestic Relations Order and lump sum payments, the "Actuarial Present Value" of a benefit shall be determined using the interest rate of 7%, unless otherwise specified in the Plan.

(c) For payments pursuant to the Qualified Domestic Relations Order, the "Actuarial Present Value" of a benefit shall be determined using the immediate interest rate prescribed by the Pension Benefit Guaranty Corporation for valuing annuities under single-employer plans that terminate without a Notice of Sufficiency on the first day of the Plan Credit Year in which the date as of which the benefit is valued occurs.

(d) For lump sum payments and converting the form of benefit to all optional forms, except as state in Subparagraph (f) below, and unless otherwise specified in the Plan, the mortality assumption shall be based on the 1971 Group Annuity Mortality Table weighted as follows:

(1) for a Participant's benefit, 100% male and 0% female;

(2) for the benefit of a Participant's Spouse or former Spouse, 0% male and 100% female; and

(3) in any other case, 50% male and 50% female.

(e) "Actuarial Equivalence" means two benefits of equal Actuarial Present Value based on the actuarial factors and assumptions specified in the provision in which that phrase is used or, if not otherwise specified, based on the assumptions described in this section.

(f) Notwithstanding any other provision of Section 1.22 to the contrary, for payments to an alternate payee pursuant to a Qualified Domestic Relations Order when payments commence due to the commencement of a Disability Pension to the Participant, the mortality assumption shall be based on the 1971 Group Mortality Table – Female for the alternate payee and the 1965 Railroad Retirement Board – Disabled Life Table for the Participant.

Plan Section 3.4. Regular Pension – Amount.

For retirements on or after October 1, 1994, the monthly amount of the Regular Pension is equal to the sum of:

(a) $4.11 for each Pension Credit base on work in Covered Employment prior to January 1, 1965, plus

(b) an amount for each Pension Credit earned during the Contribution Period in accordance with the following schedule:

Pension Credit Earned Prior to 10/1/76 at a Contribution Rate of:	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit
	$.10 to .11	$3.48	$1.00	$47.04
$0.10	.12 to .17	4.36	1.05	49.65
0.15	.18 to .23	6.63	1.10	52.26
0.20	.24 to .29	9.40	1.15	54.88
0.25	.30 to .35	12.22	1.20	57.45
0.30	.36 to .41	14.98	1.25	60.13
0.35	.42 to .47	17.77	1.30	62.72
0.40	.48 to .53	20.55	1.35	65.34
0.45	.54 to .59	23.35	1.40	67.96
0.50	.60 to .64	26.14	1.45	70.54
	.65 to .69	28.76	1.50	73.17
	.70 to .74	31.37	1.55	75.78
	.75 to .79	33.96	1.60	78.42
	.80 to .84	36.59	1.65	81.02
	.85 to .89	39.19	1.70	83.63
	.90 to 94	41.79	1.75	86.22
	.95 to .99	44.43	1.80	88.85

Pension Credit Earned Prior to 10/1/76 at a Contribution Rate of:	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit	Pension Credit Earned on or after 10/1/76 at a Contribution Rate of:	Monthly Benefit Amount per Pension Credit
	$1.85	$91.40	$2.95	$138.90
	1.90	94.22	3.00	140.98
	1.95	96.70	3.05	143.07
	2.00	99.32	3.10	145.15
	2.05	101.40	3.15	147.23
	2.10	103.47	3.20	149.31
	2.15	105.55	3.25	151.39
	2.20	107.30	3.30	153.47
	2.25	109.72	3.35	155.55
	2.30	111.80	3.40	157.63
	2.35	113.88	3.45	159.71
	2.40	115.96	3.50	161.79
	2.45	118.05	3.55	163.87
	2.50	120.14	3.60	165.95
	2.55	122.23	3.65	168.03
	2.60	124.31	3.70	170.12
	2.65	126.40	3.75	172.20
	2.70	128.47	3.80	174.28
	2.75	130.56	3.85	176.36
	2.80	132.64	3.90	178.44
	2.85	134.73	3.95	180.52
	2.90	136.81	4.00	182.60

In the event an Employee earned Pension Credit during a Plan Year based on more than one Contribution rate, the Contribution Rate which determines his pension benefit for all Pension Credit earned during such Plan Credit Year shall be the highest Contribution Rate at which an Employee

worked in Covered Employment for a least 250 hours in that Plan Credit Year.

If an Employee did not work at least 200 hours (250 hours before October 1, 1994) at any one Contribution Rate in that Plan Credit Year, the Contribution Rate which determines his pension benefit for all Pension Credit earned during such Plan Credit Year shall be based on the average Contribution Rate for that period. The average Contribution Rate will be determined as follows:

(a) The contributions paid to the Pension Fund on behalf of an Employee during the Plan Credit Year shall be totalled;

(b) The number of hours for which contributions were paid during that same Plan Credit year on behalf of an Employee shall be totalled;

(c) The total contributions shall be divided by the total hours. The result shall then be rounded to the nearest whole cent (or to the nearest multiple of 5 cents, for Plan Credit Years prior to October 1, 1976) and shall be the average Contribution Rate.

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OFFICE OF THE CLERK

No. 02-891

In the Supreme Court of the United States

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v.

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The "anti-cutback" rule in Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), generally prohibits any amendment of a qualified pension plan that has the effect of eliminating or reducing an early retirement benefit attributable to services provided by a participant before the amendment.

The question presented is whether an amendment to a multiemployer pension plan that provides for the suspension of the payment of early retirement benefits during periods that a participant, after retiring, is again employed in the same industry is a prohibited elimination or reduction of benefits when applied to employees who retired before adoption of the amendment.

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INTEREST OF THE UNITED STATES

This case presents the question whether an amendment to a multiemployer pension plan that permits the plan to suspend payment of early retirement benefits during periods that a retired participant is again employed in the same industry constitutes a reduction of benefits prohibited by Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g). With certain exceptions, the Secretary of the Treasury has authority to interpret and administer the provisions of Title I of ERISA relating to the vesting and accrual of benefits under qualified pension plans, as well as the corresponding provisions of Title II of ERISA relating to the qualification of pension plans for favorable tax treatment. See Reorg. Plan No. 4 of 1978, § 101, 92 Stat. 3790. That authority encompasses both

Section 204(g) of ERISA and its counterpart in the Internal Revenue Code (Code), 26 U.S.C. 411(d)(6), which imposes identical requirements. The Secretary of Labor has more general authority to interpret and administer Title I of ERISA, including Section 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B), and its Code counterpart, 26 U.S.C. 411(a)(3)(B), which govern the suspension of benefit payments during periods in which retired participants are reemployed in certain capacities. See 92 Stat. 3790. The United States filed an amicus curiae brief in this case at the petition stage in response to this Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), provides that an amendment to a pension plan may not decrease the "accrued benefit" of a pension plan participant, and further provides that a plan amendment that has the effect of "eliminating or reducing" an early retirement benefit attributable to service before the amendment shall be treated as a prohibited decrease of accrued benefits. 29 U.S.C. 1054(g)(1) and (2). A separate provision of ERISA, Section 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B), authorizes a multiemployer pension plan to provide for the suspension of the payment of benefits to retirees during periods in which they are employed in the same industry, trade or craft, and geographic area covered by the plan. This case presents the question whether an amendment to a multiemployer pension plan that permits the plan to suspend payment of early retirement benefits during periods that a participant, after retiring, is again employed in the same industry constitutes a prohibited reduction of the benefits themselves under Section 204(g). In the judgment of the United States, amendments permitting such suspensions or expanding the

scope of employment triggering such suspensions may be applied to current retirees without violating Section 204(g). The language and structure of ERISA show that Congress distinguished between temporary suspension of benefit *payments* authorized by Section 203(a)(3)(B) and reductions in the accrued *benefits* themselves (that is, the participant's entitlement under a plan, ordinarily based on his years of service and compensation history and ordinarily expressed as a defined periodic payment at normal retirement age). Accordingly, a suspension of benefit payments permitted by Section 203(a)(3)(B) does not reduce a participant's accrued benefits under the plan. A plan amendment that permits such a suspension or expands the scope of employment that will trigger a suspension likewise does not constitute a prohibited reduction in benefits.

1. Respondents are participants in a multiemployer defined benefit pension plan that is administered by petitioner Central Laborers' Pension Fund. Respondents retired in 1996, when they were each 39 years old. Upon retirement, they began receiving monthly benefit payments under a so-called "service only" pension (*i.e.*, a pension supplying benefits calculated only on their length of service and supported entirely by employer contributions). Those payments were available to plan participants who retired at any age, so long as they had earned a threshold number of pension credits. Under the plan, the monthly early retirement benefit payments were the same as the payments available at normal retirement age. Thus, the pension provided a "subsidized" retirement benefit, in that payments were not actuarially reduced to take into account the fact that payments began earlier and would likely continue over a longer period. Pet. App. 4a. Under the plan, monthly benefit payments for persons who retire before age 60 are suspended during periods when the retirees thereafter work in certain "disqualifying employment." At the time respon-

dents retired, the plan defined "disqualifying employment" as employment "in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker)." *Ibid.*

After their retirement, respondents obtained jobs as supervisors in the construction industry. That type of employment was not then "disqualifying employment" under the plan, and respondents therefore continued to receive their monthly payments. Two years after respondents retired, the plan was amended to expand the definition of "disqualifying employment" to include (for participants who retire before age 53) work "in any capacity in the construction industry (either as a union or non-union construction worker)." Pet. App. 5a. The plan construed the amended definition of "disqualifying employment" to encompass the supervisory work performed by respondents. Accordingly, after providing respondents notice, the plan suspended their monthly benefit payments. *Ibid.*

2. Respondents brought this action against the plan under Section 502 of ERISA, 29 U.S.C. 1132, to obtain payment of the suspended benefits. Respondents claimed that the plan amendment defining "disqualifying employment" to include supervisory work violates Section 204(g) of ERISA, 29 U.S.C. 1054(g), by "reducing an early retirement benefit." 29 U.S.C. 1054(g)(2)(A); 26 U.S.C. 411(d)(6)(B)(i).

The district court ruled in favor of the plan. Pet. App. 33a-45a. Relying on *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998), the court held hat the amendment to the plan did not violate Section 204(g) because it involved a "suspension of benefit payments" expressly authorized by ERISA rather than a prohibited "reduction of benefits." Pet. App. 37a-38a. The court explained that, "unlike a reduction in benefits situation, * * *

the suspension is temporary in nature and completely under the control of the retirees who can avoid or terminate suspension of benefit payments by declining or terminating disqualifying employment."[1] *Id.* at 38a.

3. A divided panel of the court of appeals reversed. Pet. App. 3a-31a. The court recognized that the "suspension" of benefit payments during respondents' employment as supervisors was only temporary under the plan (*ibid.*), and acknowledged that suspension under "a pre-existing plan provision * * * would not decrease accrued benefits." *Id.* at 20a; accord *id.* at 14a n.10. The majority nevertheless concluded that the amendment permitting suspension of benefit payments effected a permanent "reduction" of respondents' total early retirement benefits because respondents would "never recover[] the payments lost during the employment period." *Id.* at 10a. The majority also noted that respondents had "lost * * * the right to continue to work in the industry while receiving monthly benefit payments" (*ibid.*), and suggested that the loss of that right also "was a reduction of early retirement benefits within the plain meaning of [Section 204(g)(2)]." *Ibid.*

Judge Cudahy dissented. Pet. App. 24a-31a. He concluded that an amendment permitting "suspension" of benefit payments authorized by Section 203(a)(3)(B) does not violate Section 204(g)'s prohibition on the "reduction" of benefits (*id.* at 24a-26a), finding that conclusion to be "firmly support[ed]" (*id.* at 26a) by the legislative history of Section 204(g)(2) and administrative interpretations of ERISA's benefit accrual provisions. Judge Cudahy also reasoned that "the broadening of the ban on 'double dipping'"—drawing a pension funded by the construction industry while still

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[1] The district court also rejected respondents' contention that petitioner acted arbitrarily and capriciously by construing the amended definition of "disqualifying employment" to encompass supervisory work. Pet. App. 38a-45a. That issue is not before the Court.

working in that industry—"seems not inequitable," *id.* at 25a, because "the suspension of pension payments does not reduce the recipient's current income because the temporarily lost pension income is replaced by earned income * * * from the very same construction industry." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals erred in holding that Section 204(g) of ERISA prohibits applying to current retirees (and existing benefit accruals) a plan amendment that expands the types of post-retirement employment that trigger temporary suspension of early retirement benefit payments.

The language and structure of ERISA show that Congress did not consider the temporary suspension of benefit payments authorized by Section 203(a)(3)(B) to constitute a "reduc[tion]" in benefits. It follows from that conclusion that a plan amendment permitting the suspension of benefit payments under Section 203(a)(3)(B) likewise would not result in a reduction of benefits prohibited by Section 204(g). ERISA consistently distinguishes between a "reduction of benefits" and an authorized "suspension of benefit *payments*." In this case, that distinction reflects the particular purpose served by the suspension of benefit payments during disqualifying reemployment under Section 203(a)(3)(B). Congress expressly authorized plans to suspend benefit payments during periods of reemployment for the purpose of preventing participants from engaging in "double-dipping" through post-retirement employment in the same industry, so that current employees will not be required to fund the benefits of retirees while competing against them for wages, and to avoid the diversion of plan resources from those who have fully retired to those who continue to earn income by working. Such suspensions do not constitute reductions in benefits because, unlike reductions, they are by definition temporary, and they do not affect the "defined level of benefits" (*Hughes*

Aircraft Co. v. *Jacobson*, 525 U.S. 432, 440 (1999)) to which a participant is entitled under the plan. As soon as respondents cease disqualifying employment, their pension payments will resume at precisely the same defined level as before. In addition, Congress provided that although such suspensions result in the permanent loss of individual payments during the months an employee is engaged in disqualifying employment, the suspension does not effect a prohibited forfeiture of the participant's "right to an accrued benefit." 29 U.S.C. 1053(a)(3)(B). As the Fifth Circuit properly concluded, "an amendment authorizing such a suspension does not serve to decrease a participant's accrued benefits, and thus cannot violate [Section 204(g)]." *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283, 291 (1998).

The legislative history of the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426, which made clear that Section 204(g) applies to early retirement benefits, confirms that understanding. To begin with, REA was designed simply to clarify that Section 204(g) applies to both normal retirement benefits and early retirement benefits, and did not change the basic meaning of the word "benefit." Because an amendment expanding the types of disqualifying employment under a suspension provision consistent with Section 203(a)(3)(B) would not violate the anti-cutback rule if it were applied to suspend fully accrued normal retirement benefits, it would not violate the rule if similarly applied to early retirement benefits. In addition, the principal House sponsor of the legislation explicitly stated that it would in no way affect suspension of benefit payments under Section 203(a)(3)(B).

Two decades of regulatory practice support the conclusion that application of amended suspension-of-payment provisions to current retirees and existing accruals does not violate the anti-cutback rule. Regulations issued by the Department of the Treasury have long provided that plans

need not adjust the accrued benefit of participants to account for suspensions of payments under Section 203(a)(3)(B), because ERISA deems that the withholding of such benefit payments does not effect a prohibited forfeiture of those accrued benefits. In addition, Internal Revenue Service (Service) documents published as sample plan language for employers since at least 1984 have said that plan sponsors may adopt amendments that introduce suspension provisions, without indicating that such amendments must be limited to benefits accruing in the future. Consistent with those documents, the Service has routinely approved such plan amendments. The Service recently incorporated that view into the Internal Revenue Manual, which explicitly provides that an amendment that suspends benefit payments "on account of [Section] 203(a)(3)(B) service does not violate [the anti-cutback rule]." Multiemployer Plan Examination Guidelines 4.72.14.3.5.3(7) (2001) (available on WESTLAW, RIA-IRM database).

Finally, the court of appeals' rule would disadvantage plan participants, by diverting plan resources from those who have fully retired, by requiring current employees to continue to fund the benefits of early retirees while competing with them for wages, and by giving plans the incentive to adopt and retain the most stringent disqualifying employment provisions. The court of appeals' rule also would impose significant administrative burdens on plan administrators by requiring them to track which suspension provisions apply to which accruals.

ARGUMENT

AN AMENDMENT TO A MULTIEMPLOYER PENSION PLAN THAT EXPANDS THE TYPES OF POST-RETIREMENT EMPLOYMENT THAT TRIGGER SUSPENSION OF BENEFIT PAYMENTS WITHIN THE LIMITS PERMITTED BY ERISA SECTION 203(a)(3)(B) MAY BE APPLIED TO PARTICIPANTS WHO RETIRED BEFORE THE AMENDMENT WITHOUT VIOLATING SECTION 204(g)(2)

A. The Text And Structure Of ERISA Establish That A Plan May Apply Amended Suspension Provisions To Current Retirees Without "Reducing" Benefits In Violation Of Section 204(g)

The court of appeals held that "a pension plan amendment which expands the types of post-retirement employment that trigger mandatory suspension of early retirement benefits violates ERISA's 'anti-cutback' rule * * * when applied to" persons who retired before the date of the amendment. Pet. App. 3a. Indeed, the court indicated that its holding extended to the suspension of benefits that are attributable to service before the date of the amendment, even if the participant had not yet retired at the time of the amendment. *Id.* at 10a n.6. The court reached those conclusions based on its understanding of the "plain meaning" of Section 204(g)'s prohibition on "reducing a[] * * * benefit" (29 U.S.C. 1054(g)(2)), viewing the provision in isolation. See Pet. App. 7a- 10a. The court failed to consider Section 204(g) within the context of the "comprehensive and reticulated" (*Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209 (2001)) scheme enacted by Congress. See generally *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall

statutory scheme."). While the court of appeals' interpretation of Section 204(g) "might be plausible were [this Court] to interpret that provision in isolation, * * * it simply is not tenable in light of [ERISA's] surrounding provisions." *Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (opinion of O'Connor, J.). Read in context, Section 204(g) does not prohibit application of amended suspension-of-payment provisions to participants who have already retired or to the benefits of future retirees attributable to service before the amendment.

1. ERISA prescribes distinct rules governing the accrual and vesting of pension benefits, which operate to "assur[e] that employees obtain rights to at least portions of their normal pension benefits even if they leave their positions prior to retirement." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981).

a. ERISA's benefit-accrual rules, set forth in Section 204 of the Act, 29 U.S.C. 1054, set minimum requirements for the rate at which plan participants earn benefits, essentially to ensure that accrual is not so "backloaded" (delayed) as to make the nominal legal right under a plan to a pension of little value because limited or no benefits have actually accrued by the time the participant retires. See generally John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law* 153-154 (3d ed. 2000). Section 204(b) requires that defined benefit plans satisfy one of three alternative minimum benefit-accrual formulas. See 29 U.S.C. 1054(b)(1); see also 26 U.S.C. 411(b)(1).[2] Section 204(g), at issue here,

[2] Title II of ERISA amended various provisions of the Internal Revenue Code involving the qualification of pension plans for special tax treatment in order to conform those provisions to the substantive requirements established by Title I of ERISA. The Internal Revenue Code thus contains counterparts to many provisions of Title I of ERISA, including both Sections 203 and 204. See generally *Pension and Employee Benefit Law*, *supra*, at 91 (noting that tax provisions contained in "Title II of ERISA[] tend[] to duplicate the substantive regulation of ERISA's [Title I] on such matters as funding and vesting"); *id.* at 235-237 (listing Code sections that are counterparts to ERISA Title I provisions).

provides that the benefits a participant has accrued in the pension plan may not be decreased by an amendment to the plan. As revised by the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, § 301(a), 98 Stat. 1451, Section 204(g) further provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit attributable to service before the amendment "shall be treated as reducing accrued benefits." 29 U.S.C. 1054(g)(2); see also 26 U.S.C. 411(d)(6).

b. ERISA also prescribes minimum requirements for the "doctrinally distinct" (*Pension and Employee Benefit Law*, *supra*, at 122) subject of the vesting of benefits. ERISA's vesting rules, set forth in Section 203 of the Act, 29 U.S.C. 1053, govern the time in which an employee's claim to accrued benefits becomes "nonforfeitable," meaning "unconditional" and "legally enforceable against the plan." 29 U.S.C. 1002(19). ERISA's vesting rules thereby prevent "practices unduly delaying an employee's acquisition of a right to enforce payment of the portion of benefits already accrued." *Alessi*, 451 U.S. at 513. They also restrict the ability of plans to forfeit that right once it is acquired, thereby preventing pension benefits from being forfeited as a sanction "for quitting, for misconduct, or upon discharge." *Pension and Employee Benefit Law*, *supra*, at 121. Section 203(a) provides that an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable (*i.e.*, vested) immediately as they accrue, and also establishes alternative minimum schedules for the vesting of accrued benefits derived from employer contributions. 29 U.S.C. 1053(a)(1) and (2); 26 U.S.C. 411(a)(1) and (2). Section 203(a) also requires a pension plan to provide that a participant must have a right to receive his normal retirement benefit

when he attains normal retirement age, 29 U.S.C. 1053(a); see also 26 U.S.C. 411(a), which typically is 65 years of age. 29 U.S.C. 1002(24); 26 U.S.C. 411(a)(8). ERISA contains no analogous rules regarding the vesting of early retirement benefits. Thus, many plans provide for early retirement benefits that are subject to various conditions, such as service conditions that exceed the normal service conditions for vesting of the accrued benefit, age conditions, and a wide range of contingencies.

Section 203(a)(3) sets forth several exceptions to these general rules of nonforfeitability. These exceptions provide that a participant's "right to an accrued benefit" derived from employer contributions "shall not be treated as forfeitable" solely because the plan provides that the benefit is not payable or the payment of benefits is suspended or reduced in specified circumstances. See 29 U.S.C. 1053(a)(3). The exception at issue here, Section 203(a)(3)(B), provides that a right to accrued benefits derived from employer contributions shall not be treated as forfeitable if the plan provides that "the payment of benefits is suspended for such period as the [participant] is employed, subsequent to the commencement of payments of such benefits," during periods of specified employment.[3] 29 U.S.C. 1053(a)(3)(B). For single-employer plans, disqualifying employment is limited to reemployment for the same company. For multi-

[3] In addition to authorizing suspension of benefit payments during periods of disqualifying employment, Section 203(a)(3) also provides that a right to an accrued benefit shall not be treated as forfeitable if benefits are not paid: (1) because of the participant's death (29 U.S.C. 1053(a)(3)(A)); (2) because of a retroactive plan amendment on account of substantial business hardship (29 U.S.C. 1053(a)(3)(C)); (3) because of the participant's withdrawal of his mandatory employee contributions from a plan that provides for such contributions (29 U.S.C. 1053(a)(3)(D)); or (4) because the plan is amended to reduce benefits or payment of benefits is suspended under 29 U.S.C. 1426 and 1441 as part of the termination of a multiemployer plan (29 U.S.C. 1053(a)(3)(F)); see also 26 U.S.C. 411(a)(3).

employer plans of the sort at issue here, receipt of benefit payments may be conditioned on the participant's refraining from employment "in the same industry, in the same trade or craft, and the same geographic area covered by the plan." 29 U.S.C. 1053(a)(3)(B)(ii). Section 203(a)(3)(B) authorizes the Secretary of Labor to prescribe such regulations as may be necessary to carry out its purposes.

2. The language and structure of ERISA show that Congress did not consider the temporary suspension of benefit payments authorized by Section 203(a)(3) to constitute a "decrease" or "reduction" in the participant's accrued benefits under the plan, which will once again be paid to him if he leaves disqualifying employment. Those provisions likewise show that a plan amendment permitting such a suspension of payments does not reduce the participant's benefits in violation of Section 204(g).

a. The language of ERISA consistently distinguishes between a "reduction of benefits" and a "suspension of benefit payments." See, *e.g.*, 29 U.S.C. 1341a(d) (plan sponsor of terminated plan "shall *reduce benefits* and *suspend benefit payments* in accordance with [29 U.S.C.] 1441") (emphasis added); 29 U.S.C. 1342(d)(1)(A)(v) (providing trustee appointed to terminate plan with power "in the case of a multiemployer plan, *to reduce benefits* or *suspend benefit payments* under the plan") (emphasis added). Several provisions also specifically distinguish between an authorized suspension of benefit payments and amendments undertaken to reduce benefits. Indeed, one such provision appears in Section 203(a) itself. See 29 U.S.C. 1053(a)(3)(E)(ii) (stating that a participant's right to an accrued benefit under a multiemployer plan shall not be treated as forfeitable solely because "the plan is amended to *reduce benefits* under section 1425 or 1441 of this title, or * * * *benefit payments* under the plan may be *suspended* under section 1426 or 1441 of this title") (emphasis added); see also 29 U.S.C. 1441(a)

(providing that in certain situations involving terminated benefit plans, the plan sponsor "shall *amend the plan to reduce benefits*, and shall *suspend benefit payments*, as required by this section") (emphasis added); 26 U.S.C. 411(a)(3)(F). The text of ERISA thus reflects that Congress drew a distinction between a reduction of a participant's benefits as calculated under the rules of the plan and an authorized suspension of benefit *payments* to a participant and treated them differently. Cf. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 8 (1987) ("The words 'benefit' and 'plan' are used separately throughout ERISA, and nowhere in the statute are they treated as the equivalent of one another. Given the basic difference between a 'benefit' and a 'plan,' Congress' choice of language is significant in its pre-emption of only the latter.").

The court of appeals found this textual distinction insignificant. In its view, although the words had distinct meanings in some applications, that did not mean that a plan amendment permitting suspensions of benefit payments would not "reduce benefits" within the meaning of Section 204(g). Pet. App. 12a-14a; see also Br. in Opp. 16. However, there is nothing in the text of ERISA to suggest that an amendment respecting authorized suspension of benefit payments is to be treated as a reduction of accrued benefits within the meaning of Section 204(g). Indeed, the only provision of ERISA of which we are aware that speaks of suspension of benefit payments having the effect of a reduction does not speak of a reduction of *benefits*—the language used by 204(g)(2)—but a reduction of "the sum of *such payments*." 29 U.S.C. 1441(d)(1) (emphasis added); see also 26 U.S.C. 418E(a) (payments shall be suspended "to the extent necessary to reduce *the sum of such payments* and *the payments of such basic benefits*") (emphasis added).

b. This distinction ERISA draws between reductions in benefits and suspension of benefit payments is not merely a

semantic one. In this case, for example, it reflects the special purposes served by the suspension of benefit payments permitted by Section 203(a)(3)(B). Congress expressly authorized the suspension of benefit payments during periods of reemployment to prevent "double-dipping" through post-retirement employment in the same industry, trade or craft, and geographic area. As Congress clearly recognized, such "double-dipping" disadvantages the employees who must continue to fund the benefits of retirees, while competing with them for the same wages; indeed, retirees may be able to undercut active employees because they can afford to work at lower salaries because of their pension income. See, *e.g.*, 3 Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4376 (Comm. Print 1976) (*ERISA Leg. Hist.*) (statement of Sen. Williams); *id.* at 4772 (statement of Sen. Javits); see also *Smith* v. *CMTA-IAM Pension Trust*, 654 F.2d 650, 658 n.9 (9th Cir. 1981). Double-dipping also diverts plan resources from those who have fully retired to those who continue to earn income by working. Cf. *Alessi*, 451 U.S. at 514 (noting that offsetting payments to a participant also receiving Social Security benefits "would advantage all participants [and] * * * would permit a higher average pension payout for each participant"). To permit plans to prevent double-dipping, Congress specifically provided that they may suspend benefit payments during periods of disqualifying employment without the suspension constituting a prohibited forfeiture of the benefits the participant has accrued under the plan. Moreover, the congressional debates preceding enactment of ERISA evinced a desire that "a plan's provisions concerning suspension [could] take into account" various factors about industrial conditions that necessarily are not static: "the particular facts and circumstances of the industry; the

objectives of industrial stability; [and] the conditions of employment and earnings in the industry." 3 *ERISA Leg. Hist.* 4669 (statement of Rep. Dent). These considerations suggest that Congress envisioned that suspension provisions would be subject to amendment.

c. In addition, the language Congress chose in Section 203(a)(3)(B) and Section 204(g) reflects two fundamental differences between a "suspension of benefit payments" and a "reduction of benefits." First, a "suspension"—like the suspension at issue here—ordinarily is temporary (see *Webster's Third New International Dictionary* 2303 (1993) ("temporary withholding")), while a "reduction" has no such temporal limitation and is typically permanent or of indefinite duration. See *id.* at 1905. The court of appeals considered the temporary suspension at issue here to be a permanent reduction only because it overlooked the second fundamental difference—that between an "accrued benefit" and a "benefit *payment*"—and thus erroneously held that the temporary suspension "reduce[d] the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues."[4] Pet. App. 10a.

[4] The court of appeals also erred to the extent it held that respondents had lost the "right" to continue to work in the construction industry while receiving retirement payments from that industry. Pet. App. 10a. To begin with, such a "right" would not be within the scope of benefits ERISA was designed to regulate or the ordinary understanding of ERISA benefits. See 29 U.S.C. 1002(2)(A) (stating that an "employee pension benefit plan" is designed to "provide[] retirement income to employees"), 1002(23) (defining "accrued benefit"). In any event, respondents lacked a statutorily protected right to receive such payments while working, for the plan retained the right to amend its "disqualifying employment" provision in the manner authorized by Section 203(a)(3)(B). See J.A. 37. Since the plan's amendment provision authorizes the plan to adopt a "disqualifying employment" provision under which "the payment of benefits is suspended" during periods of specified post-retirement employment, the adoption of such a provision does not result in the loss of any legally cognizable "right" to work in disqualifying employment while receiving benefits or the loss (or reduction) of an "accrued" benefit.

Contrary to the court of appeals' belief, a participant's "accrued benefit" under a plan is not defined as the total sum of the payments he or she actually receives over the course of retirement. Rather, a participant's "accrued benefit" represents his available entitlement under the plan (ordinarily based on the participant's years of service and compensation history), which is typically expressed in terms of a defined level of periodic payments at normal retirement age. See 29 U.S.C. 1002(23) (defining "accrued benefit" as "the individual's accrued benefit determined under the plan and * * * expressed in the form of an annual benefit commencing at normal retirement age"); see also *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 440 (1999) (describing "accrued benefits" as "a right to a certain defined level of benefits"); cf. *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717 (1989) (stating that a defined benefit plan provides "a fixed level of benefits").

d. When Congress amended Section 204(g) as part of the REA to make clear that the provision applies to early retirement benefits, it did so by prohibiting plan amendments having the effect of eliminating or reducing an early retirement "benefit" (rather than "accrued benefit"), see REA § 301(a), 98 Stat. 1451; 29 U.S.C. 1054(g)(2). That difference in terminology, however, reflects no difference in substance, because the amendment was simply added to address uncertainty about whether early retirement benefits *are* accrued benefits. See pp. 20-21, *infra*. And Congress explicitly equated "benefits" and "accrued benefits" for these purposes by providing that an amendment that has the effect of reducing an early retirement benefit will be treated as reducing "accrued benefits." 29 U.S.C. 1054(g)(2). The amendment thus did not expand the basic scope of what Section 204(g) protects. Cf. *Bellas* v. *CBS, Inc.*, 221 F.3d 517, 523 (3d Cir. 2000) (while "Congress did modify section 204(g) in [the REA] to the end that early retirement benefits

and retirement-type subsidies were defined as being accrued for purposes of ERISA's anti-cutback provisions," "the definition of an accrued benefit has not been modified").

e. A benefit payment is a single periodic (typically monthly) payment. The nonreceipt of periodic payments because of a suspension authorized by Section 203(a)(3)(B) does not result in a "reduction of benefit" if the participant's entitlement to "a certain defined level of benefits" (*Hughes Aircraft*, 525 U.S. at 440) remains the same under the plan.[5] Under that understanding, suspension of respondents' benefit payments pursuant to Section 203(a)(3)(B) does not reduce their benefits. As soon as respondents cease their disqualifying employment—either by fully retiring, by entering a different industry or trade, or by leaving central Illinois —their pension payments will resume at precisely the same defined level as before.[6]

3. The text of Section 203 itself confirms that suspension of benefit payments during periods of disqualifying employment does not reduce a participant's accrued benefit—and that an amendment permitting such suspensions does not do so either. Although the suspension of benefit payments during periods of disqualifying employment results in the

[5] Thus, for example, if two participants of the same age and compensation history had the same years of service with a company, and therefore had the same "accrued benefit," their "benefits" would be considered the same although one had had payment of benefits suspended during several months of disqualifying employment. By the same token, the two employees would have the same "benefits" if one employee died shortly after retirement and ceased receiving payments and the other lived for thirty years after retirement.

[6] Indeed, if the pension plan at issue here involved sufficient employee contributions, instead of exclusively employer contributions, the benefit payments would increase slightly. Because the participant retains an absolute entitlement to recover his own contributions, see 29 U.S.C. 1053(a)(1), future payments would have to be increased to offset any loss of payments derived from his own contributions during the period of suspension.

plan "permanently withhold[ing]" payments that otherwise would have been made during those months, I.R.S. Notice 82-23, 1982-2 C.B. 752; accord 29 C.F.R. 2530.203-3(d)(1) (payment is "withheld permanently"), Section 203(a)(3)(B) explicitly provides that the loss of those payments because of disqualifying employment will not be deemed to effect a forfeiture of a participant's "right to an accrued benefit" (29 U.S.C. 1053(a)(3)(B)). Thus, Section 203(a)(3)(B) treats the "accrued benefit" as remaining constant, and identifies the potential issues resulting from a suspension of payments as one of forfeiture of the right to that accrued benefit. Thus, the text of Section 203(a)(3)(B) itself establishes that a participant's accrued benefit is not reduced by a suspension of benefit payments during periods of disqualifying employment. It follows that "an amendment authorizing such a suspension does not serve to decrease a participant's accrued benefits, and thus cannot violate [Section 204(g)]." *Spacek*, 134 F.3d at 291; accord Pet. App. 30a (Cudahy, J., dissenting) ("To change the rules governing suspensions is merely to create a suspension with a little different design than an earlier one. The rules addressing the consequences of invoking a suspension necessarily encompass changes leading to a new form of suspension."). And because an amendment expanding the types of disqualifying employment under a suspension provision consistent with Section 203(a)(3)(B) would not violate the anti-cutback rule of Section 204(g) if it were applied to suspend fully accrued normal retirement benefits, it would not violate the rule if similarly applied to early retirement benefits.[7] As set forth more fully below,

[7] Respondents contend that under this reading of ERISA, "a plan would be entitled to promulgate an amendment 'suspending' *all* early retirement benefits for 18 months, *without violating the cutback rule*." Br. in Opp. 15. Respondents' concerns about a lack of protection against such an amendment are unfounded. ERISA and its implementing regulations explicitly authorize suspension of benefit payments under only

giving early retirement benefits *greater* protection than normal retirement benefits would be contrary to Congress's plain intent in enacting the REA.

Moreover, Section 203 contains its own prohibition on certain types of plan amendments that affect benefit *vesting* that parallels the protection of Section 204(g) for benefit *accrual*. Section 203(c) prohibits plan amendments that alter vesting schedules and that have the effect of reducing participants' nonforfeitable percentage of accrued benefits, unless the amendment gives participants the option of having their nonforfeitable percentage calculated under the pre-amendment vesting schedule. See 29 U.S.C. 1053(c)(1)(A) and (B). Because Section 203 contains its own limitation on plan amendments—which does not apply to amendments providing for suspension of payments as permitted by Section 203(a)(3)(B)—there is particular reason to conclude that amendments involving suspension-of-payment provisions are not governed by a separate limitation on plan amendments contained in another section of ERISA addressing the distinct subject of the *accrual* of benefits.

B. The Legislative History of the Retirement Equity Act of 1984 Confirms That Congress Did Not Intend Section 204(g) To Prohibit Amendments To Disqualifying Employment Provisions

Under ERISA as originally enacted, it was uncertain whether early retirement benefits were "accrued benefits." See, *e.g.*, *Amato* v. *Western Union Int'l*, 773 F.2d 1402, 1407, 1414 (2d Cir. 1985) (holding that early retirement benefits are "accrued" for purposes of anti-cutback rule); *Bencivenga* v. *Western Pa. Teamsters & Employers Pension Fund*, 763 F.2d 574, 577-578 (3d Cir. 1985) ("Case law also supports the

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two circumstances—during periods of disqualifying employment and during plan termination or insolvency. See, *e.g.*, 29 U.S.C. 1426, 1441; 26 U.S.C. 418E(a); 29 C.F.R. 2530.203-3.

conclusion that early retirement benefits are not accrued benefits under ERISA."). It was also unclear, therefore, whether Section 204(g) as originally enacted prevented plans from decreasing early retirement benefits. See *Pension and Employee Benefit Law*, *supra*, at 164. In 1984, Congress enacted the Retirement Equity Act, which made clear that early retirement benefits are protected by Section 204(g) against reduction by plan amendment. See REA § 301, 98 Stat. 1451. The REA added language to both ERISA Section 204(g) and its Internal Revenue Code counterpart (26 U.S. 411(d)(6)) providing that a plan amendment that has the "effect of eliminating or reducing an early retirement benefit or a retirement-type subsidy * * * with respect to benefits attributable to service before the amendment *shall be treated as reducing accrued benefits.*" 29 U.S.C. 1054(g)(2) (emphasis added); see also 26 U.S.C. 411(d)(6)(B).

As the language of the provision itself indicates, the amendment was enacted for the purpose of affording early retirement benefits "the same form of protection from reduction by amendment accorded to accrued benefits." *Spacek*, 134 F.3d at 291. The Committee Reports emphasized that the new language of Section 204(g)(2) merely "clarifies the scope of the prohibition against [benefit] decreases" and "would not affect the application of any other provision of the Code." S. Rep. No. 575, 98th Cong., 2d Sess. 28 (1984); accord H.R. Rep. No. 655, 98th Cong., 2d Sess. 25-26 (1984) (stating that Section 204(g)(2) "codifies present law"). Nothing in the REA suggests an intent to intrude upon the nonforfeitability rules and exceptions that Congress had already established in Section 203, or to depart from the understanding that a suspension of benefit *payments* pursuant to a plan provision authorized by Section 203(a)(3)(B) does not result in a decrease of accrued *benefits*. As the *Spacek* court concluded, because the amendment of a disqualifying-employment provision of a plan permitted by

Section 203(a)(3)(B) does not abridge the "accrued benefits" of plan participants with respect to normal retirement benefits, "then it also cannot violate [Section 204(g)] if applied to early retirement benefits." 134 F.3d at 291.

Representative William Clay, the "principal sponsor" (130 Cong. Rec. 23,488 (1984)) of the House bill that embodied the amendment to Section 204(g), made this point clear during the congressional debates (*id.* at 23,487 (emphasis added)):

> I wish to further clarify the anti cutback provisions of Section 301 of the bill. Those provisions are not intended to apply to benefit changes authorized by existing law. * * * *Nor do those provisions in any way apply to or affect the provisions of ERISA section 203(a)(3)(B)* and [Internal Revenue C]ode section 411(a)(3)(B) relating to the suspension of benefits for postretirement employment, including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.

As the court emphasized in *Spacek*, Representative Clay's statement indicates that Section 203(a)(3)(B) of ERISA "authorizes the very type of [plan] amendment at issue in this case [for employees who retire under a qualified plan], and * * * [Section 204(g)] in no way limits this authorization." 134 F.3d at 290.

The court of appeals found Representative Clay's remarks to be "ambiguous at best" (Pet. App. 16a) and discounted them because it could identify no other support in the legislative history for Representative Clay's explanation of the amendment. *Ibid.* As the dissent below correctly observed, however, the "effort of the majority to explain away this comment is unconvincing" (*id.* at 26a), because the "legislative history * * * fits so closely with the interpretation founded on plain meaning." *Ibid.* Respondents likewise err in contending (Br. in Opp. 18) that Representative Clay's

statements "merely stressed * * * that REA did not alter Section 203's distinction between what forms of suspensions may be promulgated for 'normal' retirement benefits as compared to early-retirement benefits." There would have been no need for Representative Clay to make a statement having the meaning that respondents attribute to it. By its own terms, Section 204(g)(2) applies only to "plan amendment[s]" (29 U.S.C. 1054(g)(2)), and would have no application to an unamended suspension provision of a plan that differentiated between suspension of normal retirement benefits and early retirement benefits.

C. The Department Of The Treasury Has Long Taken The Position That A Suspension Of Benefit Payments Authorized By Section 203(a)(3)(B) Does Not Reduce Benefits, And That Application Of Amended Suspension-Of-Payment Provisions To Benefits Attributable To Service Prior To The Amendment Does Not Violate Section 204(g)

1. More than two decades of regulatory practice supports the conclusion that application of amended suspension-of-payment provisions to current retirees and existing accruals does not violate the anti-cutback rule. Since 1977, the Department of the Treasury has taken the position in formal regulations that "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] § 203(a)(3)(B)." 42 Fed. Reg. 42,318, 42,339 (1977); 26 C.F.R. 1.411(c)-1(f).[8]

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[8] Although this regulation is codified in Title 26 of the Code of Federal Regulations, the Department of the Treasury has made clear that its regulations implementing the Internal Revenue Code provisions of ERISA also apply to the corresponding sections in Title I of ERISA. See, *e.g.*, 53 Fed. Reg. 26,050, 26,053 (1988) ("The regulations under section 411 are also applicable to provisions of Title I [of ERISA]."); see also 65 Fed. Reg. 53,901, 53,902 (2000) ("Treasury regulations issued under section 411(d)(6)(B) of the Code apply as well for purposes of Section 204(g)(2) of

Accord T.D. 7501, 1977 WL 52383 (Apr. 25, 1977) (explaining the addition of paragraph (f)); Rev. Rul. 81-140, 1981-1 C.B. 180 (stating that when a retiree is employed "in section 203(a)(3)(B) service, the nonforfeitability requirements are not violated even though actuarial adjustments to the employee's accrued benefit in a defined benefit plan are not made"). The Department has explained that no such adjustment is required in the case of suspensions of benefit payments under Section 203(a)(3)(B) because under the text of ERISA, "a plan may permanently withhold a participant's pension payment (without a prohibited forfeiture [of benefits] resulting) for any month in which the participant is employed in 'section 203(a)(3)(B) service.'" I.R.S. Notice 82-23, *supra*; accord IR-82-139, 1982 WL 210486 (Dec. 3, 1982). As the Fifth Circuit correctly concluded in *Spacek*, "because the reduction in total benefits paid over the lifetime of the plan participant as a result of the suspension need not be accounted for actuarially in computing the participant's accrued benefit under [29 U.S.C.] § 1054(c)(3)," an amendment authorizing such a suspension "does not serve to decrease the participant's accrued benefits, and thus cannot violate [Section 204(g)]." 134 F.3d at 291.

The court of appeals majority found that Treasury regulation unpersuasive. See Pet. App. 17a-21a. In the court's view, it is "irrelevant" (*id.* at 19a) that suspension of normal retirement benefit payments during periods of disqualifying employment is not deemed to affect accrued benefits, because under Section 204(g)(2), amendments that have the effect of reducing early retirement benefits shall "be *treated* as reducing accrued benefits." *Id.* at 18a; see also Br. in Opp. 18-19. The court erred. First, the court failed to appreciate the import of the regulation, which is that because the mere

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ERISA."). See generally Reorganization Plan No. 4 of 1978, § 101, 92 Stat. 3790.

suspension of benefit payments is not deemed to cause a reduction in the accrued benefit of a participant under the plan, an amendment permitting such a suspension would not result in a "reduction." Congress presumably was aware of this regulation when it enacted the REA in 1984, and expected that a suspension of early retirement benefit payments would no more constitute a reduction in such "benefits" than a suspension of normal retirement benefit payments would result in a decrease in "accrued benefits." Cf. *Boeing Corp.* v. *United States*, 537 U.S. 437, 457 (2003) (Congress's failure to reject interpretation of statute set forth in regulations during subsequent enactments "is persuasive evidence that Congress regarded that regulation as a correct implementation of its intent."); *Alessi*, 451 U.S. at 519 (noting that "when it enacted ERISA, Congress knew of the IRS rulings permitting integration and left them in effect"). Second, the court of appeals' reading would have the perverse result of giving early retirement benefits protection under Section 204(g) superior to that granted normal retirement benefits, contrary to Congress's clear intent of merely extending them equivalent protection.

2. In addition, the Department of the Treasury's practice for nearly twenty years has reflected its view that plan amendments that introduce suspension provisions or expand the scope of disqualifying post-retirement employment under Section 203(a)(3)(B) can be applied to benefits attributable to service prior to the amendment. The Internal Revenue Service (Service) periodically publishes a Listing of Required Modifications (LRM) setting forth "samples of plan provisions that have been found to satisfy certain specific requirements of the Internal Revenue Code," so as "to assist sponsors [of pension plans] who are drafting or redrafting plans to conform to applicable law and regulations." *Defined Benefit Listing of Required Modifications and Information Package* cover page (2000)

<http://www.irs.gov/pub/irs-tege/db_lrm.pdf>. Since at least 1984, the Service has explicitly stated in its LRMs that existing plans may adopt a suspension-of-payment provision under Section 203(a)(3)(B), without indicating that such an amendment must be limited to new plans or new accruals. See, *e.g.*, *id.* at 111; *Defined Benefit Listing of Required Modifications and Information Package* 44-46 (1987); *Defined Benefit Listing of Required Modifications and Information Package* 44-45 (1984). The Service reports that during that period, it has consistently approved plan amendments that introduced suspension provisions or expanded the scope of disqualifying employment without requiring the plans to apply those provisions to new accruals only.

More recently, and after notice and comment, the Internal Revenue Service incorporated its longstanding view into its Multiemployer Plan Examination Guidelines, a manual that sets forth technical guidance for Service field personnel. The Guidelines state that "[a]n amendment that reduces IRC 411(d)(6) protected benefits on account of [Section] 203(a)(3)(B) service does not violate IRC 411(d)(6)." Multiemployer Plan Examination Guidelines 4.72.14.3.5.3(7) (2001) (available on WESTLAW, RIA-IRM database). This position is entitled to deference as the considered judgment of the agency charged with administering and implementing both Section 204(g), its Code counterpart, 26 U.S.C. 411(d)(6), and most of the other accrual and vesting provisions of ERISA, based on its long experience and confirmed after public notice and comment. The "'well-reasoned views' of an expert administrator rest on 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Alaska Dep't of Envtl. Conservation* v. *EPA*, No. 02-658 (Jan. 21, 2004), slip op. 21 (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998)); *id.* at 22 ("Cogent 'administrative interpretations . . . not [the] products of formal rulemaking . . . neverthe-

less warrant respect.") (quoting *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003)) (alterations in original). Such views warrant "serious consideration" because of the agency's "unique advantages" stemming from its "day-to-day efforts to implement its statutory mission." 1 Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.4, at 334 (4th ed. 2002).

3. The court of appeals erred (Pet. App. 21a) in concluding that a Treasury regulation implementing the Internal Revenue Code counterpart of the anti-cutback rule (26 U.S.C. 411(d)(6)) supports its conclusion in this case. That regulation specifies that a plan may not be amended to add new conditions that restrict the availability of a "section 411(d)(6) protected benefit that has already accrued." 26 C.F.R. 1.411(d)-4 Q&A-7. By its own terms, however, that regulation has no relevance to plan amendments that provide for suspension of benefit payments in accordance with Section 203(a)(3)(B). Because a participant does not have a right to be free from a post-retirement employment-disqualification provision that (as in this case) conforms to Section 203(a)(3)(B), he is not "protected" against the resulting suspension of benefit payments. The regulation on which the court of appeals relied therefore is simply inapplicable to this case. Moreover, the Service does not construe this regulation to prohibit plan amendments permitting suspension of benefit payments under Section 203(a)(3)(B), but rather, as explained above, has explicitly concluded that amendments permitting suspension of payments "on account of 203(a)(3)(B) service does not violate [the anti-cutback rule]." Multiemployer Plan Examination Guidelines 4.72.14.3.5.3(7). Cf. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations.").

D. The Court Of Appeals' Rule Would Create Unwarranted Administrative Burdens And Harm Plan Participants

Because plan investments, retirement rates, and industry conditions are not static, trustees of multiemployer pension plans historically have been permitted to revise the terms of disqualifying-employment provisions to promote industrial stability and the actuarial soundness of pension plans. See Br. Amicus Curiae for Nat'l Coord. Comm. for Multiemployer Plans at Pet. Stage (NCCMP Cert. Amicus Br.) 2-3, 9-12. Thus, for example, plans have amended the definition of "disqualifying employment" to relax restrictions on reemployment when unemployment rates in an industry are low to encourage retirees to return to the workforce, and to reinstate more restrictive suspension provisions during economic downturns, when active workers are having difficulty finding employment and plan investments are performing more poorly. The traditional flexibility to make such adjustments has permitted plan trustees better to control the financial soundness of the plan on whose solvency all participants depend, in the face of underperforming plan investments or reductions in plan funding stemming from declining employment. Plan boards of trustees—which under federal law must be composed equally of representatives of labor and management, see 29 U.S.C. 186(c)(5)(B)—are well situated to evaluate current circumstances and tailor plan amendments to address them fairly.[9] See generally NCCMP Cert. Amicus Br. 5-6.

[9] The court of appeals suggested (Pet. App. 11a n.6) there was no need for such flexibility, saying that Congress afforded plans all the relief necessary by permitting plan amendments that reduce accrued benefits in the case of "substantial business hardship." 29 U.S.C. 1082(c)(2); see 29 U.S.C. 1054(g)(1). However, amendments are possible under the "substantial business hardship" provision only when the plan is on the verge of insolvency. See 29 U.S.C. 1083(b)(4). There is no reason to believe that Congress intended to reserve the flexibility to use a mechanism with relatively mild effects on retirees who *necessarily are currently employed* for situations in which there is a prospect that a multiemployer plan will fail and adversely affect tens of thousands of employees and retirees.

The court of appeals' construction of Section 204(g) would impose unjustified burdens on both multiemployer plan participants and administrators by eliminating plans' long-standing flexibility to adjust reemployment restrictions in light of local economic conditions and the state of plan finances. Affirmance of the court of appeals' decision would have the effect of locking current reemployment restrictions in place for all benefits attributable to service prior to the amendment, and would on balance divert plan resources away from future retirees and persons who have fully retired in favor of current retirees who are still earning income by working within the same industry. The diversion of resources is particularly difficult to justify where, as here, participants essentially have "retired" into a job promotion, moving from employment as a construction worker into a supervisory position. Furthermore, because the court of appeals' rule essentially would prohibit changes that affected already accrued benefits (regardless of whether the participant had already retired), see Pet. App. 10a n.6, it would be extremely burdensome for pension plans that *do* amend their suspension provisions to track which suspension provisions apply to which accruals.

A holding that plans lack the flexibility to apply an amendment to suspension provisions to benefits of current retirees and other benefits attributable to service prior to the amendment would in the long run disadvantage workers, because plans would have incentives to adopt the most restrictive reemployment conditions at the outset to avoid administrative burdens and potentially crippling outlays. As this Court noted in the related context of employee welfare benefit plans, "[g]iving [funds] th[e] flexibility [to amend

their plans] also encourages them to offer more generous benefits at the outset, since they are free to reduce benefits should economic conditions sour. If employers were locked into the plans they initially offered, 'they would err initially on the side of omission.'" *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 515 (1997) (quoting *Heath* v. *Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS, THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, THE MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA, THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, THE SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION AND THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

ERISA Section 203(a)(3)(B) authorizes a pension plan to "suspend[]" the "payment of benefits" for the period that a participant leaves retirement to return to the workforce in certain capacities. ERISA Section 204(g), the "anti-cutback" rule, forbids plan amendments that "decrease" previously accrued pension "benefits."

The question presented is whether a pension plan amendment regarding disqualifying employment that is authorized under ERISA Section 203(a)(3)(B) is nonetheless forbidden by Section 204(g) to the extent it applies to previously accrued benefits.

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INTEREST OF THE *AMICI*[1]

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of employee benefits legislation and regulations promulgated to implement the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. § 1001—1169, and other laws affecting multiemployer plans. Currently, 311 multiemployer pension plans are affiliated with the NCCMP. These affiliated plans cover a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. The NCCMP has frequently participated as *amicus curiae* in the United States Supreme Court and the federal courts of appeal.

The Mechanical Contractors Association of America (MCAA), the National Electrical Contractors Association (NECA), and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) are nonprofit, tax-exempt organizations representing the interests of employers in a large segment of the high-skill and high-wage construction trades. There are 2,200 employers affiliated with the MCAA and its affiliated associations nationwide. NECA has 4,420 member contractors in the United States with an excess of 19,000 contractors who currently authorize NECA and its local chapters to bargain on their behalf. There are approximately 1,900 employer members of SMACNA throughout the United States.

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[1] Pursuant to Rule 37.6 of the Rules of the Court, the undersigned hereby state that no counsel for Petitioner or Respondents authored any part of this brief. Moreover, no person or entity other than the NCCMP made a monetary contribution to the preparation or submission of this brief.

The contractors affiliated with these employer associations specialize in an array of trades and crafts including electrical, mechanical, plumbing, heating, ventilating and air conditioning, architectural and industrial sheet metal, specialty stainless steel, energy management and industrial testing. Employer members work in a variety of industries including construction, service, maintenance, utilities, telecommunications, broadcasting, manufacturing, transportation and government. The MCAA, NECA and SMACNA, their related entities and their member employers are distinguished for their longstanding and vast investment in the training and development of high-skilled workforces. Through collective bargaining with their union counterparts, member employers sponsor and fund numerous multiemployer benefit plans including apprenticeship and training plans, health and welfare plans, and retirement benefit plans including multiemployer defined benefit pension funds.

The Laborers' International Union of North America, AFL-CIO (LIUNA), the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (UA), the Sheet Metal Workers' International Association, AFL-CIO (SMWIA) and the International Brotherhood of Electrical Workers, AFL-CIO (IBEW) are unincorporated labor organizations that represent employees in a variety of trades. LIUNA, with over 800,000 members, is a diverse, multi-craft union representing workers in various fields of construction, including highway, tunnel, pipeline and building construction and hazardous material removal. The UA, with over 300 local union affiliates and approximately 326,000 members, both active and retired, is a multi-craft union representing high-skilled workers engaged in the fabrication, installation and servicing of piping systems. The SMWIA, with a membership of around 155,000—of whom 30,000 are retirees—represents high-skilled sheet metal workers in industries such as building and construction, shipyards, railroads, and service

and maintenance. The IBEW—which has over 780,000 members—represents employees who work in a variety of industries, including utilities, construction, telecommunications, broadcasting, manufacturing, railroads and government.

Collectively, these labor organizations and their local affiliates negotiate collective bargaining agreements on behalf of workers throughout the country. Through the collective bargaining process, these unions provide employers with a highly skilled and trained workforce and strive to foster industrial stability through labor-management cooperation. The agreements negotiated by the LIUNA, UA, SMWIA and IBEW on behalf of the employees they represent include critical benefit packages that require signatory employers, *inter alia*, to contribute to multiemployer pension plans.

Multiemployer pension plans provide pension coverage for some ten million American workers, one-fifth of all workers who participate in pension plans. By law, these plans are administered by boards of trustees comprised of individuals appointed by both labor and management; each trustee owes a duty of loyalty to plan participants and beneficiaries. The well-being and security of employees, retirees and their dependents are directly impacted by multiemployer pension plans, and interference with the maintenance and growth of such plans is deemed to be contrary to the national public interest. 29 U.S.C. § 1001a(a)(1), (3) and (c)(2).

The NCCMP and its member plans have a strong interest in urging reversal of the decision below. If allowed to stand, the holding will significantly and adversely impact the effective administration and financial well-being of multiemployer pension plans. It will detract from the ability of trustees to employ ERISA's "suspension of benefit" rules in response to fluctuating employment and retirement patterns that impact the plans' current funding status. The NCCMP, the sponsoring employer associations and the unions also have a strong interest in protecting against the potential adverse impact of

"double dipping"[2] on the funding of plans, especially in times of economic distress or uncertainty.

The employer associations have a strong interest in ensuring that their members' employees participate in adequately funded and efficiently administered pension plans so that the value of employer contributions will ultimately translate into valuable retirement benefits for current employees. The employer associations also have a residual interest in seeing that plans can respond to fluctuating labor markets by enabling early retirees temporarily to rejoin the labor force. Further, having made the financial contributions that have funded the pensions of many double dipping retirees, these *amici* have a stake in insuring that those contributions are not used to subsidize the low-wage workforces of competitors when work is scarce.

The union *amici* have a strong interest in ensuring that the workers they represent will receive meaningful pension benefits at retirement, especially those workers who, upon retirement, have few additional sources of income or are permanently disabled or are otherwise unable to return to the workforce. The unions also have an interest in preserving the job opportunities, wage rates and benefits of active employees, and in providing a steady and reliable stream of skilled workers to signatory employers, which interests would be undermined by the change to regulation of suspension of benefit rules which is proposed in this case.

Finally, the NCCMP, the employer associations and the unions fear that the decision below will expose a number of

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[2] In the context of this case, double dipping occurs when a retiree who is receiving pension benefit payments returns to employment while his pension payments continue. Thus, pension payments subsidize his wages. If a retiree returns to employment in the trade or craft covered by the plan that provides his benefits, the retiree simultaneously may be accruing additional pension benefits under the plan.

multiemployer pension plans to significant unanticipated liabilities. Plan trustees have long relied on the position of the courts and the Internal Revenue Service that amendments like those challenged by the Respondents do not violate ERISA's anti-cutback rules. A reversal to this rule of law would result in additional liabilities and reassessment of longstanding funding assumptions, at the inevitable expense of active plan participants and current retirees.

Both Petitioner and Respondents have consented to the filing of this brief, as is evidenced by letters of consent that have been filed with the Court.

SUMMARY OF ARGUMENT

A. Through Section 203(a)(3)(B) of ERISA, Congress provided that certain specifically defined suspensions of benefit payments were not to be construed as forfeitures of accrued benefits prohibited under ERISA Section 203(a). Section 203(a)(3)(B)(ii) permits a multiemployer pension plan to suspend a benefit payment to a participant who would otherwise be entitled to receive such payment but for the fact of his return to specified categories of employment after retirement. By this provision Congress intended to alleviate the adverse impact double dipping participants can have on the financial well-being of multiemployer plans, their participants and beneficiaries, sponsoring employers, labor markets, industrial stability, and wages and conditions of employment in a particular industry.

B. Since the enactment of ERISA many multiemployer pension plans have used the suspension provision of ERISA Section 203(a)(3)(B)(ii) as a means of encouraging or discouraging returns to employment by retirees in the relevant industry. This provision, which limits the scope of ERISA's nonforfeiture rules, was intended as a tool multiemployer pension plans could use to deal with the economic exigencies that may affect a particular industry or a plan's actuarial

soundness at any given time. For suspension of benefit rules to be effective over time, multiemployer plans must have the flexibility to expand the scope of disqualifying employment when economic conditions warrant, in order to maintain actuarial soundness and to protect the interests of actual retirees and active non-retired participants.

C. For years, the Internal Revenue Service has consistently approved plan amendments that have either introduced suspension of benefit provisions or expanded the scope of disqualifying employment for purposes of existing suspension of benefit provisions. There is no evidence that the Internal Revenue Service has ever challenged a plan's adoption of a suspension of benefit provision that falls within the scope of ERISA Section 203(a)(3)(B). The longstanding position of the IRS, which has been incorporated into the Service's Multiemployer Plan Examination Guidelines of the Internal Revenue Manual,[3] is supported by the plain meaning of the statute and takes into account the diverse interests served by the Act. Relying on the statute, prior court decisions and IRS guidance, trustees of multiemployer pension plans have amended plans either to add suspension of benefit provisions or expand definitions of disqualifying employment without reason to fear they might be violating the anti-cutback rule of ERISA Section 204(g), the provision erroneously relied upon by the majority below.

[3] *See* Internal Revenue Manual, at § 4.72.14.3.5.3(7) ("Suspension of Benefits") (May 4, 2001) (available on WESTLAW RIA-IRM database) (hereinafter "Multiemployer Plan Guidelines"). The Multiemployer Plan Guidelines set forth the technical guidance for the Service's field personnel, technical staff, and plan determination personnel. Internal Revenue Manual § 4.72.14.1.

ARGUMENT

AN AMENDMENT TO A MULTIEMPLOYER PENSION PLAN THAT, CONSISTENT WITH ERISA SECTION 203(A)(3)(B), PROVIDES FOR THE SUSPENSION OF PAYMENT OF EARLY RETIREMENT BENEFITS DURING PERIODS THAT A PARTICIPANT, AFTER RETIRING, ENGAGES IN CERTAIN EMPLOYMENT DOES NOT VIOLATE THE ANTI-CUTBACK PROVISIONS OF ERISA SECTION 204(g).

A. Through ERISA Section 203(a)(3)(B)(ii), Congress sought to protect multiemployer pension plans, plan participants, contributing employers and sponsoring labor organizations from the adverse impact of double dipping retirees.

1. *As Congress has expressly recognized, multiemployer pension plans serve a unique function in providing retirement income security for millions of Americans who would not otherwise have access to pension coverage.*

In ERISA, Congress declared that the private employee benefit system is "affected with a national public interest," and determined that the regulation of private employee benefit plans would be exclusively a federal concern. ERISA Section 2(a), 29 U.S.C. § 1001(a). The Multiemployer Pension Plan Amendments Act ("MPPAA"), Pub. L. 96-364, Stat. 1209-1210, was adopted in 1980 to enhance the financial soundness of multiemployer pension plans[4] and to foster

[4] Multiemployer pension plans are maintained pursuant to collective bargaining agreements. ERISA Section 3(37), 29 U.S.C. § 3(37). Multiemployer plan assets are held in trust, and the plans are jointly administered and equally represented by trustees appointed by management and labor. Labor Management Relations Act of 1947 § 302(c)(5)(B), 29 U.S.C. § 186(c)(5)(B).

their maintenance and growth. *See* MPPAA § 3, 29 U.S.C. § 1001a; Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H.R. Rep. No. 96-869, pt. 1 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918. *See also NLRB v. AMAX Coal Co.*, 453 U.S. 322, 338 n.22 (1981). MPPAA, which amended both ERISA and the Internal Revenue Code, demonstrates Congress's recognition of the special needs of such plans, which serve millions of employees, retirees and dependents.

Multiemployer plans fill an important need in industries in which single employer pension plans cannot suffice to protect the typical employee. Employees in industries such as construction or trucking, which are characterized by irregular employment or frequent shifts of workers between employers, benefit from the availability of multiemployer plans.[5] Similarly, these plans provide benefits at an affordable cost in industries dominated by small employers such as garment manufacturers, restaurants and service establishments, which would not individually be able to support an adequate and secure pension plan for their employees.

In general, multiemployer pension plans are designed to allow employees to gain credits toward pension benefits from work with multiple employers who contribute to the plans in accordance with the terms of the employers' collective bargaining agreements. Some plans cover participants in a trade or craft throughout the country, while others provide coverage for employees of contributing employers in a particular industry in a specific geographic area. In either situation, workers are able to move from job to job while continuing to earn credits toward their pension benefit.

[5] Among construction workers, the median tenure with an employer in January 2002 was 2.8 years, compared with 3.5 years for all workers. Bureau of Labor Statistics, U.S. Dep't of Labor, Employee Tenure in 2000, (BLS newsletter, 2001), *available at* ftp://ftp.bls.gov/pub/news.release/tenure.txt.

Moreover, because multiemployer pension plans continue even if particular employers go out of business, such plans help protect workers from the potentially devastating consequences of business downsizing, mergers and closings.

While multiemployer plans generally function in the same manner as their single-employer counterparts, certain features of multiemployer defined benefit pension plans[6] reflect the special needs of their participants. For instance, multiemployer plans are far more likely to include provisions that allow for portability of pension credits among different multiemployer plans. Such programs ensure that participants will vest in and receive a meaningful pension benefit even though they may work in numerous jurisdictions covered by numerous plans. Over 60 percent of multiemployer plans have such portability provisions, compared with 3 percent of single employer plans.[7]

[6] Three out of five multiemployer pension plans are defined benefit plans. Defined benefit plans, like the plan administered by the Petitioner, cover approximately 80 percent of multiemployer pension plan participants. Defined benefit pension plans generally provide for a benefit stated in the form of a life annuity with benefit formulas based on a number of factors requiring a variety of actuarial projections. By contrast, money purchase plans, 401(k) plans and other defined contribution plans provide for contributions in specified amounts to be made to separate "individual accounts" for each participant. Typically, multiemployer defined contribution plans do not include suspension of benefit provisions. Most of these plans provide lump sum benefit options or purchase annuity contracts from insurance companies with the assets held in a participant's individual account.

[7] Other notable distinctions include the fact that only 69 percent of single employer plans provide for disability retirement benefits, compared with 91 percent of multiemployer plans. Also, multiemployer plans are far more likely to provide full pension restoration if a spouse predeceases the participant and are far more likely to provide survivor benefits to children. Harriet Weinstein and William J. Wiatrowski, Multiemployer Pension Plans, *Compensation and Working Conditions*, Spring 1999, at 21, *available at* http://www.bls.gov/opub/cwc/archive/spring1999art4.pdf.

Another characteristic of multiemployer pension plans, especially those providing benefits to participants in the construction industry and related trades and crafts, is that they typically offer early retirement benefits which are often subsidized, *i.e.*, the benefits are not actuarially reduced to account for early retirement. As Congress has recognized, these subsidized early retirement pensions serve an important function in physically demanding occupations:

> [C]onstruction work is physically hard, and is often performed under harsh climatic conditions. Workers are worn down sooner than those in most other industries. Often, early retirement is a must. Multiemployer pension plans accommodate these needs of their covered workers by providing for early retirement, disability, and service pensions that provide a subsidized, partial or full pension benefit.[8]

Thus, participants who will not reach normal retirement age under a plan for many years will nonetheless be eligible for a subsidized early retirement benefit if they have completed a minimum number of years of service. Significantly, because the benefits are subsidized, they are more expensive to the plan than benefits provided on or after normal retirement age.

2. *Recognizing the unique features and potential vulnerability of multiemployer pension plans and their sponsoring entities, Congress created a special mechanism both to protect the financial well-being of plans and to enhance industrial stability.*

Under Section 203(a)(3)(B)(ii) of ERISA, a multiemployer plan may include provisions suspending retirement benefit payments when the retiree returns to work in the same

[8] 144 Cong. Rec. 7574, 7578 (daily ed. July 7, 1998) (statement of Sen. D'Amato).

industry, in the same trade or craft, and in the same geographic area covered by the plan without violating the nonforfeitability requirements set forth in Section 203(a).[9] Employment that will trigger suspension of benefit payments is commonly referred to as "disqualifying employment."[10] Thus, if a retiree enters disqualifying employment, ERISA Section 203(a)(3)(B)(ii) provides that the plan's temporary[11] withholding of benefit payments while the retiree works in

[9] In adopting Section 203, Congress recognized the need to ensure that pension rights, once they are required to be vested, may not be lost by an employee. S. Rep. No. 93-383, at 50 (Aug. 21, 1973), *reprinted in* 1 Leg. Hist. at 1118. A form of forfeiture prevalent before the enactment of ERISA that particularly concerned Congress, known as "bad boy" clauses, serve to deprive an employee of a benefit simply because he later went to work for a competitor, or in some other way demonstrated "disloyalty" to the employer. *See id.;. Noell v. American Design, Inc.*, 764 F.2d 827 (11th Cir. 1985) (discussing the relationship between ERISA's vesting requirements and a plan's bad boy clauses).

[10] Since 1981, regulations promulgated by the Department of Labor have specified a range of permissible definitions of disqualifying employment. *See* 29 CFR §2530.203-3 *et seq*.

[11] The word "suspend" (the term used in Section 203(a)(3)(B)) means "to cause (as an action, process, practice, use) to cease for a time : stop temporarily. . ." Webster's Third New International Dictionary of the English Language Unabridged (1992) (def. 2a). A suspension of pension payments under Section 203(a)(3)(B) is clearly a temporary action. It ceases when the participant stops working in disqualifying employment or on the participant's "required beginning date," *see* I.R.C. § 401(a)(9)(C), whichever is earlier.

A suspension of benefit payments in theory could become permanent if a participant died with no survivor benefit payable, but this circumstance would not render the suspension a forfeiture due to a separate provision of the Act. *See* ERISA Section 203(a)(3)(A) ("A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in Section 205)), 29 U.S.C. §1053(a)(3)(A).

disqualifying employment will not be deemed a forfeiture of an accrued benefit under Section 203(a) of the Act.

Multiemployer plans may adopt suspension of benefit rules restricting post-retirement employment to the full extent permitted under Department of Labor regulations, they may narrowly tailor restrictions on post-retirement employment to certain types of employment that fall within the range permitted by the regulations, or they may choose not to restrict post-retirement employment at all. Trustees of multi-employer plans have come to regard suspension of benefit rules as an important element of plan design which primarily helps trustees respond to funding issues which can be impacted by retiree reemployment in the industry covered by a plan.

Relevant considerations such as the actuarial soundness of pension plans, industrial stability, conditions of employment, and investment performance of fund assets are not fixed in time but are impacted by fluctuations in unemployment rates, the relative aging of a workforce, the vagaries of financial markets, or other unforeseen events that impact the entire economy, specific industries or particular regions. The trustees of multiemployer pension plans, representing both labor and management, are uniquely qualified to assess those circumstances insofar as they pertain to their own plans at any given time. Using that expertise, the trustees can employ a suspension of benefit provision as a dynamic and adaptable tool for addressing a number of economic exigencies.

The plans' need for flexibility and the ability to protect against the adverse effects of double dipping were driving forces behind Section 203(a)(3)(B). Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, detailed the congressional purpose in the following terms:

> The type of suspensions contemplated by this provision are those which prevent plan assets from being used to pay retirement benefits to persons who have, in fact, returned to work for employers covered by the plan. Also contemplated are provisions designed to protect participants against their pension plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of employees covered by the plan. . . .

120 Cong. Rec. 29928, 29930 (daily ed. Aug. 22, 1974), *reprinted in* 3 ERISA Leg. Hist. of the Employee Retirement Income Security Act of 1974, at 4738 ("ERISA Leg. Hist."). Senator Javitz echoed these sentiments:

> The purpose of this limited exception to what is generally a rule precluding divestiture of vested benefits is to protect unions against undercutting of wage scales and the additional expense generated by the need to subsidize retirement benefits for those who have left the work force as well as retirement benefits for those continuing to work—if such a course was required. . . . The purpose of the suspension rule is to protect the legitimate interests of the union with respect to those persons who have really not retired and not to penalize retirees where, on balance, the interest of the union are not adversely affected to a substantial degree.

120 Cong. Rec. 29928, 29942 (daily ed. Aug. 22, 1974), *reprinted in* 3 ERISA Leg. Hist. 4772. Representative Dent outlined the role Department of Labor regulations would play to further the purposes articulated by his Senate counterparts:

> [T]he conferees expressly provided in Section 203(a)(3)(B) that a plan be permitted to suspend benefits under certain circumstances. This section further authorizes the Secretary to prescribe regulations necessary to carry out the purposes of this provision. It is contemplated that those regulations would permit a plan's provisions concerning suspension to take into account the particular facts and circumstances of the industry; the objectives of industrial stability; the conditions of employment and earnings in the industry;

the benefit payment period of the plan; and the burden of onerous and costly administrative procedures imposed upon the plan by these provisions.

120 Cong. Rec. 29192, 29197 (daily ed. Aug. 22, 1974), *reprinted in* 3 ERISA Leg. Hist. at 4669.

Accordingly, Section 203(a)(3)(B) fairly may be said to provide a safe harbor for multiemployer pension plans within which they may adopt suspension of benefit provisions tailored to particular plan needs at any given time without running afoul of ERISA's rules governing forfeitures.

B. Multiemployer plan trustees periodically have amended suspension of benefit rules in order to address changing employment and economic conditions, precisely as was envisioned by Congress.

ERISA Section 203(a)(3)(B) is an unusual provision of the Act in that its purpose, as articulated by its drafters, is directed to some extent toward matters beyond plans and their participants. Congress recognized that in order to have well-funded pension plans and secure, meaningful retirement benefits for participants, it was appropriate under certain circumstances to permit plan sponsors to limit the adverse impact that payment of pension benefits to active employees may have on the industry that funds the plan. It follows that the scope of a plan's suspension provisions can be tailored to reflect the economic conditions of the underlying industry at given points in time.

1. The factors and conditions which prompted Congress to adopt ERISA Section 203(a)(3)(B)(ii) are not static over time.

Although employer contributions made on behalf of retirees when they were active participants help to fund their pension benefits, multiemployer defined benefit plans also rely on current employer contributions to fund the pension

benefit obligations of retirees and current employees. Consequently, periods of high unemployment will significantly impact the actuarial soundness of these plans. On the other hand, periods of low unemployment create their own set of problems for contributing employers and underlying Industries—most significantly, skills shortages. Deep and frequent fluctuations between periods of high and low unemployment are commonplace in the industries in which multiemployer plans predominate, and can have a debilitating effect on plan funding.

Since the enactment of ERISA, nationwide unemployment rates in the construction industry have fluctuated from levels as low as 8 to 9 percent in the mid 1970's to levels as high as 18 to 23 percent in the early 1980's. By the end of the 1990's, which was characterized by a boom in construction, unemployment levels retreated back down to 6 to 9 percent. In between these long-term trends, the construction industry experienced regular double digit percentage swings in unemployment levels from year to year.[12]

These pronounced cyclical patterns of unemployment generate their own set of problems for the affected industries. During downturns, there is typically a corresponding exodus of skilled workers from the industry, with workers leaving a depressed trade or craft permanently for better opportunities elsewhere. Conversely, during boom periods, shortages in skilled labor cause tremendous problems for employers and their customers. *See* "Skilled Labor Shortages Head List of Contractors' Greatest Concerns," Construction Labor Report, v. 45, no. 2259 (Jan. 5, 2000).

Nationwide trends only tell part of the story. More refined studies show that even greater volatility in employment

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[12] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Unemployment Rates and Levels in the Construction Industry, 1974-2003 (Series LFS2101060020(1) and LFS2202060020(1).

cycles is found among local and regional areas and among the various trades. In a 2000 report by the Associated General Contractors, for example, surveys showed that although skilled bricklayers, operating engineers, electricians, sheet metal workers, plumbers and pipe fitters were scarce in Delaware, there was no shortage of available carpenters, cement masons, iron workers, roofers and laborers in that state. In that same study, the data for neighboring Maryland showed the opposite result. Similarly, during a period when Mississippi Valley contractors described the workforce for all craft classifications as plentiful, most crafts were reported to be in short supply in Virginia and the Carolinas.[13]

While the construction industry has addressed labor shortages in the past through recruitment and training programs, those approaches alone have offered little immediate relief, oftentimes adding to the ranks of the unemployed once a boom recedes. An alternative to these approaches is to fill openings for skilled trades with retirees. Reentry of retirees into the workforce provides immediate relief to employers by providing a pool of candidates who arrive ready with the

[13] *See "AGC Report Finds Continued Dominance of Market by Open Shop, Skill Shortages,"* Construction Lab. Rep. (BNA) 881, v. 46, no. 2295, Sept. 27, 2000; *see also "Skilled Shortages Prompts Contractors in Idaho to Sign Pacts with Carpenters,"* Construction Lab. Rep. (BNA) 717, v. 46, no. 2291, Aug. 23, 2000 (regarding the shortage of skilled carpenters in Boise); *"Low Unemployment Rates Prompt Employers to Turn to Untapped Labor Pools,"* Daily Lab. Rep. (BNA) S-7, no. 123, June 26, 2000 (regarding the labor market in New England); *"Parties in Northwestern States Bargain in Heated, Full Employment Economy,"* Construction Lab. Rep. (BNA) 18, v. 46, no. 2267, Mar. 1, 2000; Jonathan Weil, *"Golden Triangle Boom Causes Labor Shortages,"* Wall St. J. Online, Apr. 22, 1998 (Southeast Texas); Rick Wartzman, *"The Price of Recovery: Builders' Labor Squeeze,"* Wall St. J. Online, Jan. 22, 1997 (California); Rebecca Blumenstein, *"Michigan and Ohio Compete for Workers Amid Shortage,"* Wall St. J. Online, June 10, 1997 (Michigan and Ohio); Elsa Brenner, *"Brighter Outlook for Construction Workers,"* N.Y. Times, Dec. 12, 1993, 13WC, at 1 (White Plains, NY).

requisite experience and skills.[14] The challenge in relying on this supplemental retiree workforce is to provide an incentive for the retirees' return and a disincentive for them to remain in the event high unemployment returns.

2. *Multiemployer pension plan trustees have used suspension of benefit provisions to encourage retirees to reenter the workforce and, when necessary, to discourage retirees from remaining.*

Double dipping undoubtedly effects a drain on the resources of multiemployer pension plans. While employer contributions on behalf of vested and non-vested active participants provide an inflow of assets into the plan with no concomitant outflow to these participants, double dipping retirees receive subsidized benefit payments from the fund while taking jobs that could be filled by the active vested or non-vested participants. Moreover, while some double dipping retirees may return to covered employment and have contributions made to the plan on their behalf, others may go to work for competing employers who do not contribute to the plan and who enjoy significantly lower labor costs than

[14] *See Craft Labor Supply Outlook, 2000-2010,* Construction Lab. Research Council , 1998; Kelly Greene, *"Making it Hard to Work,"* Wall St. J. Online, Dec. 7, 2003; Kelly Greene, *"Companies Could Entice Older Workers to Stay On,"* Wall St. J. Online, Nov. 20, 2002; *"Policy Needs to Address Worker Shortage Affecting All Industries, House Panel Told,"* Construction Lab. Rep. (BNA) 1425, v. 45, no. 2266, Feb. 23, 2000; Gene Epstein, *"Retire? Hell No!,"* Barron's Online, Mar. 27, 2000; Marjorie Valbrun and Glenn Burkins, *"Tight Labor Market Causes Leaders to Rethink Immigration Restrictions,"* Wall St. J. Online, Feb. 10, 2000; *"Worker Shortages Restrain Otherwise Robust Pace As New Pay Schemes Abound,"* Daily Lab. Rep. (BNA), no. 99, May 24, 1999; *"CPWR Considers Research Agenda on Bargaining, Workforce Issues,"* Construction Lab. Rep. (BNA), v. 44, no. 2177, Apr. 29, 1998.

the employers whose contributions funded those retirees' pension benefits, health benefits and training.[15]

Nevertheless, current conditions in a specific industry, trade or craft, such as a regional skills shortage at times of full employment, may indicate that a degree of double dipping is in the best interest of the plan. This also offers retired participants an opportunity to supplement their incomes without harming the plan's overall financial well-being. Most multiemployer pension plans have been amended over time to provide for the suspension of benefits under some prescribed conditions. However, the range among plans for what constitutes "disqualifying employment," especially before normal retirement age, is dramatic and—like the industries themselves—often subject to change.[16]

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[15] *See* discussion, *supra*, at 13-14 (thus, Congress' concern that multiemployer pension plans would help to subsidize the labor costs of employers who pay low wages and little or no benefits).

[16] In the preamble to its Proposed Suspension of Benefit Rules, the Department of Labor acknowledged that multiemployer plans could adopt a wide range of suspension of benefit rules:

> It should be noted that Section 203(a)(3)(B) and this regulation do not require plans to provide for or impose suspensions of benefits. In addition, while a suspension may not be imposed unless the requirements of the Act and this regulation would be met, the Department is of the view that a plan which has elected to provide for suspension of benefits is not required to provide for suspension of benefits to the fullest extent that the Act and this regulation would permit. For example, a plan could provide that "Section 203(a)(3)(B) service" . . . would result when an employee contemplates 60 or more hours of service in a calendar month in the relevant type of employment. . . As another example, a multiemployer plan could provide that the "geographic area covered by the plan" does not include all the territory which would qualify for inclusion under the Act and this regulation. . .

For example, many plans may draft suspension provisions that are triggered only by full-time work or that limit suspensions to those retirees who primarily work "with the tools" and do not serve as supervisors. Many other plan trustees choose to apply the strictest suspension rules available under the Act and regulations, with the knowledge that restrictions can be eased to accommodate changed conditions (such as the commencement of a large public project) which demand that employers retain a particularly large workforce for an extended period of time.

It is true, as the court below noted, that plan rules that use a narrow definition of disqualifying employment effectively permit many early retirees to engage in double dipping. Pet. App. 10a n.6. The practice, however, is often a mixed blessing, and a plan's circumstances can readily change so as to render double dipping an undue burden on the plan and on other participants. As discussed above, the trustees of a multiemployer plan may choose to abide a certain level of double dipping when economic conditions in a specific industry, trade or craft so warrant and when the plan's current funding permits.[17] When those conditions change, plans require the ability to re-adjust their suspension rules.

Department of Labor, Office of Pension and Welfare Benefit Programs, "Minimum Standards for Employee Benefit Plans; Suspension of Benefit Rules; Final Rules and Proposed Rulemaking," Fed. Reg. 8894-8895 (Jan. 27, 1981).

[17] Indeed, the unprecedented performance of the U.S. financial markets and generally high employer contribution levels during the 1990s compelled multiemployer pension plan trustees to either provide greater benefits or subject their contributing employers to onerous tax liabilities. *See generally*, I.R.C. §§ 404(a)(1)(A) and 412(a) (limiting the amount deductible in any year for contributions to a qualified pension trust to the amount necessary to satisfy the minimum funding standard).

What is more, plans must continually meet ERISA's minimum funding standards notwithstanding the fact that plan assets are typically invested in equity and fixed income securities subject to the vagaries of Wall Street. Moreover, the total amount of employer contributions, which provides the ongoing funding to such plans, is based solely on the hours worked by the employers' employees, even in times of high unemployment.[18] Thus, multiemployer pension plans have often exercised the option of amending their suspension of benefit provisions in a way that restricts the employment opportunities available to early retirees who want their benefit payments to continue. As we discuss below, such amendments have proceeded with the full knowledge and blessing of the relevant regulatory agency, the Internal Revenue Service.

[18] For multiemployer defined benefit plans, suspension rules are especially valuable in the trustees' efforts to regulate funding requirements. An employer sponsoring a single employer defined benefit plan has complete control over how its plan will be funded and will generally seek to fund the plan within the range prescribed in I.R.C. §§ 412 and 404(a)(1). By contrast, multiemployer defined benefit plans are funded through contributions made by numerous employers who are required to pay rates fixed in accordance with collective bargaining agreements with durations of several years or more. Such contribution rates typically cannot be changed during the term of collective bargaining agreements to accommodate deficits or surpluses, and negotiated contribution rates must be sufficient to pay future benefits. Thus, multiemployer plan sponsors do not control, but merely anticipate, the amount of contributions coming into the fund from year to year.

C. Multiemployer plan trustees have administered plans and adopted suspension of benefit amendments in reliance on the stated position of the Internal Revenue Service and the courts; a change to that rule will have an unfair adverse impact on plans, their participants, contributing employers, and labor organizations.

1. *Prior to the decision below, multiemployer pension plan trustees could rely on a uniform body of authority to freely adopt or amend suspension of benefit provisions within the scope of ERISA §203(a)(3)(B)(ii).*

For many years, the Internal Revenue Service and the courts, relying on the plain meaning, purpose and structure of the statute, have recognized that a "suspension" of benefit payments under ERISA Section 203(a)(3)(B) is not a decrease, reduction or elimination of an accrued benefit within the meaning of Section 204(g) of ERISA. Specifically, the Service and the courts have construed Section 203(a)(3)(B) as a special provision defining the scope of vested rights under Section 203(a).[19] This construction gives effect to Congress's intent, clearly articulated in the legislative history of Section 203(a), not to protect the ability of early retirees working in 203(a)(3)(B) employment to continue receiving benefit payments while so employed. The majority below, in contravention of the statutory purpose, would create such a right

[19] *See* cases cited in note 24 and accompanying text. In contrast to those holdings, the majority below finds that ERISA Section 204(g) *implicitly* prohibits amendments that suspend benefit payments of retirees. If in fact Congress sought to prohibit plan amendments that suspend benefit payments of retirees who are reemployed in 203(a)(3)(B) service, one may wonder why Congress did not *expressly* provide for this in Section 203? Congress could readily have done this, having included in ERISA Section 203(c) detailed rules relating to amendments altering vesting schedules. *See* Section 203(c) of ERISA, 29 U.S.C. § 1053(c).

based upon a misinformed interpretation of ERISA Section 204(g)(2).[20]

The Petitioner fairly details the deficiencies that underscore the reasoning of the majority below that a "suspension" under ERISA Section 203(a)(3)(B) equates to a "reduction" under ERISA Section 204(g).[21] As Petitioner explains, the majority's reading of the Act is contrary to fundamental precepts of statutory interpretation, its interpretation of amendments to ERISA Section 204(g) is contrary to the legislative history of the Retirement Equity Act of 1984, and its holding is contrary both to applicable regulations and the repeatedly stated position of the Internal Revenue Service.

The importance of the longstanding position of the Service to the sponsors and administrators of multiemployer pension plans cannot be overstated. Trustees of pension plans affiliated with the NCCMP have requested advance approval from the Internal Revenue Service regarding the continued qualification of their plans before adopting suspension of benefit rules or amending existing rules so as to expand the scope of disqualifying employment for all participants, active and retired. Many other plan trustees have adopted amendments and filed amended and restated plans with the Service for determination of continued tax-qualified status, disclosing that their plans have been amended to include or expand

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[20] The distinctions between ERISA's vesting provisions and its accrual provisions are critical ones. *See, e.g., McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund*, 320 F.3d 151, 159 (2d Cir. 2003):

> Congress has treated accrued benefits and vested benefits differently. The Supreme Court has found ERISA to be "an intricate, comprehensive statue." *Boggs v. Boggs*, 520 U.S. 833, 834 (1997). ERISA is a complicated enough statute without the courts soldering new Sections onto it.

[21] In this regard, Judge Cudahy's dissent also offers a discerning refutation of the reasoning underpinning the majority's decision below.

suspension of benefit provisions without regard to a participant's status as a retiree.

In all of these instances, the Service has either given its prior blessing when requested, or it has approved the amendments after the fact.[22] No such suspension amendment has been challenged or rejected by the Service on the theory that it allegedly violated ERISA's anti-cutback provision.[23] In accordance with prior opinions of other circuits,[24] the Fifth Circuit's unanimous holding in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir 1998) expressed full concurrence with this interpretation of the Act.

The position of the Internal Revenue Service regarding Section 203(a)(3)(B) is expressly set forth in its Multiemployer Plan Guidelines, which state that "[a]n amendment that reduces I.R.C. 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate I.R.C. 411(d)(6)." Multiemployer Plan Guidelines § 4.72.14.3.5.3(7). This declaration carries considerable weight, since the Guidelines set forth the technical guidance for the Service's field personnel, technical staff, and plan determination personnel. Multiemployer Plan Guidelines § 4.72.14.1. When reviewing

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[22] *See also* U.S. Cert *Amicus* Br. 13-14.

[23] If such an amendment did violate Section §204(g) (I.R.C. § 411(d)(6)), the plan would be treated as not satisfying the requirements of ERISA's minimum vesting standards and would risk losing its tax qualified status. *See* I.R.C. § 411(d)(6)(A) ("A plan shall be treated as not satisfying the requirements of this Section if the accrued benefit of a participant is decreased by an amendment of the plan. . .").

[24] *See Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir. 1995) (recognizing that ERISA Section 204(g) "involve[s] a reduction or elimination of accrued benefits and retirement-type subsidies, not a suspension, as is the case here"); *Deak v. Masters, Mates and Pilots Pension Plan*, 821 F.2d 572, 575 n.5 (11th Cir. 1987) (explaining that under ERISA a pension that is "fully vested . . . cannot be reduced, but it can be suspended").

a multiemployer plan for compliance with ERISA and the Service's myriad regulations, IRS personnel rely on the Guidelines to determine whether the plan is a qualified plan pursuant to I.R.C. § 401(a) and thus entitled to favorable tax treatment.

Accordingly, with the full blessing of the Internal Revenue Service, trustees of multiemployer pension plans have repeatedly exercised the authority to adopt and expand disqualifying employment provisions within the scope of Section 203(a)(3)(B)(ii) and Department of Labor Regulations.

2. *For years, trustees of multiemployer pension plans have taken their right to amend suspension of benefit provisions into account when considering the feasibility of providing particular benefits.*

The Respondents assert that by law they were entitled to rely on receipt of their monthly pension payment in order to supplement their income. Pet. App. 10a n.5. However, ERISA's vesting rules place express limits on a participant's right under that Act to pension payments while working in 203(a)(3)(B) service.[25] Thus, any right Respondents had to

[25] It is also notable that the Respondents were in their early forties at the time they brought this action. Both ERISA and the Internal Revenue Code show that distributions to younger reemployed "retirees" from tax-qualified plans are generally disfavored. For example, I.R.C. § 72(t) places a 10-percent additional tax on early distributions from qualified retirement plans. The legislative history of that provision of the Code provides—

> Although Congress recognized the importance of encouraging taxpayers to save for retirement, Congress also believed that tax incentives for retirement savings were inappropriate *unless the savings generally were not diverted to nonretirement uses.* One way to prevent such diversion was to impose an additional income tax on early withdrawals from tax-favored retirement arrangements

benefit payments while employed in 203(a)(3)(B) service arose out of the plan document, not ERISA, and was limited by the trustees' discretion and the trustees' amendment powers as set forth in the plan.

By contrast, the reliance of plan trustees on the ability to amend suspension of benefit rules has a firm legal basis. The flexibility to revise suspension rules has been a significant factor in the trustees' consideration of adjustments and improvements in benefit levels, which are often necessary and desirable in the face of increases in the cost of living. When trustees and plan actuaries consider benefit improvements, including but not limited to those relating to subsidized early retirement benefits, they rely on the existing statutory and regulatory scheme as interpreted and applied by the Service and by the courts. Thus, for example, when the trustees of the Central Laborers' Pension Fund considered whether that plan could afford to provide early retirees with a heavily subsidized Service-Only Pension, the trustees and their actuaries were entitled to include the power to suspend benefit payments in their equation. Plan amendments relaxing and tightening suspension of benefit rules within the scope of 203(a)(3)(B) are among the tools Congress provided to protect plan assets,[26] and trustees have been entitled to rely upon the continuing viability of that tool.

> in order to discourage withdrawals and to recapture a measure of the tax benefits that had been provided.

STAFF OF THE JOINT COMMITTEE ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 713-14 (May 4, 1987) (emphasis added).

[26] The use of suspension of benefit ruies to protect a plan's overall funding for the benefit of all participants and beneficiaries is fully consistent with the overarching fiduciary obligations of plan trustees. *See Caterino v. Barry*, 8 F.3d 878, 883-884 (1st Cir. 1993) (discussing how defined benefit multiemployer plan trustees may balance the interests of

3. *The decision below, if adopted by the Court, will have significant adverse impacts.*

The majority below dismisses the adverse impact its ruling will have on the Central Laborers' Pension Fund, its participants and beneficiaries, noting that the plan can simply "curb[ ] certain reemployment prospectively." Pet. App. 10a n.6. Similarly, in their brief in opposition to the petition for writ of certiorari, the Respondents contend that if the financial integrity of a pension plan is in jeopardy, the trustees may seek the protections of ERISA Section 302(c)(8) relating to cutbacks of accrued benefits in times of "substantial business hardship." This myopic view—putting aside the gross unfairness of imposing such measures on a plan that has operated in full compliance with existing law—ignores the broader implications that such a change would have for multiemployer plans.

The new rule of law suggested by the decision below would require plan trustees to find ways to shift the financial burden of funding double dippers' benefit payments to other classes of plan participants. The group most likely to be affected consists of active participants whose future rate of benefit accruals can be reduced by amendment. Current and future retirees may also find that they receive fewer and smaller benefit increases, as plans adjust their funding assumptions to account for the new obligations imposed by such a ruling.

For those multiemployer plans unfortunate enough to have to seek relief under the substantial business hardship exception of ERISA Section 302(c)(8), the damage will be far greater. Indeed, the majority below and the Respondents fail to appreciate what is well understood by the *amici*: distressed multiemployer pension plans do not attract new employers

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"actuarially-favored" groups against the interest of providing a "guaranteed decent pension for all longtime workers.").

and pose a strong disincentive for current employers to continue contributing after their contracts expire. These hardships are compounded in the case of multiemployer pension plans with large proportions of older participants, in which a steady stream of new participating employers is a key aspect to their financial stability. Any employer considering participation in a multiemployer defined benefit plan must account for the fact that the contributions it makes to the plan will fund not only the pensions of its own workers but the plan's entire accumulated liabilities, including the benefits of other employers' active employees, inactive employees, retirees, and any double dipping retirees.

Moreover, the highly likely result of the ruling proposed by Respondents would be that plans would be amended prospectively so as to implement the strictest suspension provisions possible under Department of Labor regulations. This will mean that future early retirees will experience suspensions that current early retirees do not. It will mean that plan sponsors will no longer be able to use adjustments in their suspension of benefit provisions to encourage older experienced workers to temporarily return to covered employment in times of skills shortages. Moreover, during periods of high unemployment, pension plans will be far less likely to enhance early retirement benefits and subsidies to encourage workers to accept early retirement, knowing that these employees cannot be wooed back to work later by the easing of suspension rules.

The new rule would also clearly have an adverse effect on plans that have previously amended their suspension of benefit provisions to suspend benefits of current retirees. Funds, like the Petitioner, would now incur unanticipated liability for benefit payments withheld on account of previously adopted amendments expanding disqualifying employment. Prospectively, retirees who had refrained from reentering the workforce because of such an amendment may

now reenter "disqualifying employment" while receiving benefits under the plan, thus taking jobs away from individuals who do not have the luxury of supplemental "retirement" income.

Such funds will also be required to amend their suspension rules once again, and in so doing they will be forced to consider adoption either of different rules applicable to different retirees or—more likely—different rules applicable to benefits accrued during different time periods. Thus, some funds may feel compelled to adopt and apply the strictest available suspension rules to future accruals, adding further complications to benefit calculations for future retirees. Both the plan amendment process and the incorporation of additional computations into benefit calculations of future retirees would impose an additional burden on plans, contrary to Congress' stated intent to insulate them from onerous and costly administrative procedures in carrying out suspension rules.

In summary, by imposing a major new restriction on plans that have long relied on a contrary rule, adoption of the holding below may set in motion a series of events that will disserve the interests of multiemployer plans, retirees, active employees, sponsoring employers and labor organizations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 02-891

IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF CENTRAL STATES

The Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer pension plan within the meaning of Sections 3(37) and 4001(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§ 1002(37) and 1301(a)(3).[1] Central States' Board of

[1] Pursuant to Rule 37.6, Central States represents that this brief has been authored solely by counsel for Central States and no party other than Central States has made a monetary contribution for the preparation or submission of this brief.

Trustees is comprised of five trustees appointed by employers and five trustees appointed by the union, as required by 29 U.S.C. § 186(c)(5)(B).The Board of Trustees is the plan sponsor within the meaning of 29 U.S.C. § 1002(16)(B). Central States is the largest multiemployer defined benefit pension plan in the United States with assets of $16.7 billion.[2] Central States has over 464,000 total participants comprised of approximately 187,000 active participants, 77,000 vested inactive participants, and 199,000 retirees. These participants and retirees reside in every judicial circuit in the United States.

Like most multiemployer defined pension plans, Central States has prohibited reemployment rules. These rules provide that a retiree that engages in prohibited reemployment, for example, working in a position similar to positions covered by collective bargaining agreements in effect in the same geographic area, or in the industries covered by the pension plan, will have his pension suspended during the duration of the prohibited reemployment. This prevents retirees from "double dipping," *i.e.*, drawing a pension while continuing to do work in the same industry from which the retiree just "retired." On March 13, 2002, Central States amended its pension plan, applicable to participants that retired on and after July 1, 2002, to provide a broader definition of prohibited employment. In other words, more jobs would be encompassed within the definition of prohibited reemployment, thereby making it more likely that a retiree's pension benefits would be suspended. In enacting the amendment to the prohibited reemployment rules, Central States' Board of Trustees relied in part on the Fifth Circuit's decision in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), which held that suspensions of benefits under

[2] All data is as of December 31, 2002, except as otherwise indicated.

prohibited reemployment rules are not subject to the "anti-cutback" provision of ERISA, 29 U.S.C. 1054(g).

Subsequent to Central States' decision to amend the prohibited reemployment rules, the Seventh Circuit in the instant case held that a suspension of benefits is subject to the anti-cutback provision of ERISA. *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002). As a result of the legal uncertainty created by the conflict between *Spacek* and *Heinz*, Central States' Board of Trustees rescinded the broader definition of prohibited reemployment in January 2003 retroactive to its inception and reverted back to the narrower definition of prohibited reemployment. Despite having amended the pension plan to restore the definition of prohibited reemployment, Central States and its Board of Trustees were sued in Northern District of Illinois in a case captioned *Richard Herman, et al. v. Central States, S.E. & S.W. Areas Pension Fund, et al.*, No. 03 C 1010 (Conlon, J.). In that case, the Plaintiffs alleged, among other things, that Central States had violated 29 U.S.C. § 1054(g) in amending the suspension of benefits rules. Ultimately, the District Court granted summary judgment to Central States holding, among other things, that Plaintiffs lacked standing to challenge the amendment since it was rescinded prior to the filing of the lawsuit. The Plaintiffs have filed an appeal from the judgment of the District Court and the case is currently pending in the United States Court of Appeals for the Seventh Circuit, No. 03-4023.[3]

[3] After the District Court entered judgment in Central States' favor, Central States' Board of Trustees amended the suspension of benefits rules. However, due to the legal conflict at issue in this case, the Board of Trustees created a "safety-valve" provision in the pension plan giving a participant the better of either the pre-amendment version of the suspension rules or the post-amendment version of the suspension rules.

SUMMARY OF ARGUMENT

ERISA's text, its regulations, and its legislative history all distinguish between a reduction of benefits and a suspension of benefits. Despite this, the Seventh Circuit interpreted 29 U.S.C. § 1054(g)'s reference to "reducing" benefits as equivalent to a "suspension" of benefits under 29 U.S.C. § 1053(a)(3)(B). Not only does the Seventh Circuit's interpretation do violence to the statutory text, it also misapplies the policy underlying 29 U.S.C. § 1054(g) to the exclusion of the policy underlying 29 U.S.C. § 1053(a)(3)(B).

The policy underlying 29 U.S.C. § 1054(g) does not counsel in favor of applying its terms to suspensions. The section is designed to prevent plan amendments that affect the participant's eligibility for a benefit, conditions that are outside of a participant's control. In contrast, suspensions of benefit payments are always in the participant's control because the participant has the choice whether to continue working in prohibited reemployment.

The Seventh Circuit's interpretation also gives no attention to the policy behind 29 U.S.C. § 1053(a)(3)(B). That section is designed to allow plans to protect its participant base, and hence its actuarial health, by ensuring that retirement benefits are actually used for retirement and not as an income supplement for a participant that takes a job with an employer in the same industry or in a job classification covered by the pension plan. Because actuarial and market conditions are constantly changing, 29 U.S.C. § 1053(a)(3)(B) is designed to provide a pension plan with the ability to create and modify suspension rules as conditions warrant. Further, constant fluctuations in the labor market make it unlikely that participants can have any settled expectations concerning the value of post-retirement employment. Therefore, changes in the rules concerning post-retirement employment will not frustrate any settled expectations, and will not run afoul of the policy goals underpinning the anti-cutback rule.

The different policies animating 29 U.S.C. § 1053(a)(3)(B) compared with 29 U.S.C. § 1054(g) make it highly improbable that Congress intended to have 29 U.S.C. § 1054(g) override 29 U.S.C. § 1053(a)(3)(B) without directly referring to the statutory term of art "suspension" in 29 U.S.C. § 1054(g). As a result, the decision of the Seventh Circuit should be reversed because the amendment of suspension of benefits rules does not violate 29 U.S.C. § 1054(g).

ARGUMENT

As detailed in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), ERISA's statutory text, its regulations, and its legislative history each distinguish a suspension of benefits from a reduction or elimination of accrued benefits. For example, Section 203(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1053(a)(3)(B)(ii), classifies prohibited reemployment rules as a suspension of benefits, and expressly provides that a benefit suspended under a prohibited reemployment rule "shall not be treated as a forfeitable accrued benefit." In addition, various statutory and regulatory provisions refer to both reductions of benefits and suspensions of benefit payments. *E.g.*, 29 U.S.C. §§ 1441(a), 1341a(d) and 1342(d); 29 C.F.R. § 2520.104b-4(a)(1)(iii). Further, Section 203(a)(3)(B)(ii) of ERISA, 29 U.S.C. § 1053(a)(3)(B)(ii), and the regulations promulgated under that provision, provide that for multiemployer plans, suspension of benefit payments after *normal* retirement age is limited to participants working in the same industry, in the same trade or craft, and the same geographic area covered by the plan. The regulations make it plain that the limitations placed on suspension of benefit payments apply only after a participant reaches *normal* retirement age, and that the limitations on suspension imposed by Section 203(a)(3)(B)(ii) do not apply to the suspension of *early* retirement benefits. 29 C.F.R. § 2530.203-3(a); *Whisman v. Robbins*, 55 F.3d 1140, 1146 (6th Cir. 1995). Thus, the statute and the regulations give a

plan broader authority to suspend benefits prior to normal retirement age.

The regulations also state that with respect to early retirement benefits "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B)." 26 C.F.R. § 1.411(c)-1(f); *Spacek*, 134 F.3d at 290. In other words, a suspension of benefits is treated differently than a reduction of benefits because a suspension of benefits does *not* result in a reduction of the accrued benefit. Therefore, because 29 U.S.C. § 1054(g)(2) only applies if an amendment "eliminates or reduces" an early retirement benefit, and because a suspension is treated as *not* reducing the accrued early retirement benefit, an amendment to the suspension rules does not violate 29 U.S.C. § 1054(g)(2). The Seventh Circuit's conclusion that an amendment of the suspension rules constitutes a cutback is simply wrong because its premise is that a suspension either "reduces" or "eliminates" an accrued benefit. However, because a suspension does not affect the calculation of the accrued early retirement benefit, a suspension neither "reduces" nor "eliminates" an accrued benefit. Therefore, an amendment to the suspension rules neither "reduces" nor "eliminates" an accrued benefit because the accrued benefit is unaffected by the suspension rules regardless of the form of those rules.

The Seventh Circuit's ruling is based upon the idea that a suspension, in effect, "reduces" a benefit within the meaning of 29 U.S.C. § 1054(g)(2). *Heinz*, 303 F.3d at 806. Not only does this argument ignore the fact that the terms "suspension" and "reduce" are terms of art in the statute and the regulations, the argument fails to give any weight to the policy behind 29 U.S.C. § 1053(a)(3)(B) allowing pension plans to suspend benefits when participants engage in prohibited reemployment. The Seventh Circuit believed that this policy was adequately served by the fact that "no one is

disputing that the suspension in this case would be proper if it were contained in the original plan." *Heinz*, 303 F.3d at 808. But as a practical matter, such a view eviscerates the ability of a pension plan to tailor the suspension of benefits rules to changing actuarial and labor market conditions.

When determining what benefits a plan may afford to offer, and the corresponding contributions needed to fund the benefits, a plan uses actuarial assumptions. One of the assumptions relates to how long a participant, on average, will continue working in covered employment before retiring and beginning to collect retirement benefits. The suspension of benefit rules serve, in part, to ensure that a participant will retire when he or she is, in fact, is actually retiring. The rules ensure that retirement benefits are actually used as retirement benefits, not as income supplements.

The rules also ensure that the participant base is not diminished by preventing non-union, non-participating companies from having an artificial advantage in the labor markets. For example, while union companies are making pension contributions on behalf of their employees, the non-union companies, but for the prohibited reemployment rules, could hire the "retirees" and *not* pay pension contributions because those "retirees" are already receiving a pension. As a result, the participating union companies are at a disadvantage in the labor markets not because those companies are more inefficient, but because they would, in effect, be subsidizing the non-union companies. In turn, the disadvantaged union companies may ultimately be forced out of business, and this would reduce the participant base of the pension fund.

Thus, in enacting 29 U.S.C. § 1053(a)(3)(B), Congress sought to give pension funds protection from just such occurrences. The Seventh Circuit's view that the underlying policy behind 29 U.S.C. § 1053(a)(3)(B) is served by merely recognizing that plans may have suspension of benefits rules

(without being allowed to change them without running afoul of 29 U.S.C. § 1054(g)), ignores the fact that labor markets are constantly shifting and that the actuarial needs of a pension fund change. The fact that the rules may be changed *prospectively* with respect to benefits accruing in the future does not satisfy the goals of 29 U.S.C. § 1053(a)(3)(B). This is because a prospective change has so little short-term effect that the pension fund essentially loses the ability to react to changing actuarial and market conditions. For example, if the plan provides for a $3,000 per month pension after 30 years of service, and after 29 years the suspension of benefits rules are changed, the participant will qualify for the benefit after the 30th year, but the plan will only be able to apply the new rule with respect to the one year of benefits that accrued during the last year, *i.e.*, the old rules still apply to 29/30th of the benefit ($2,900) with the new rules only affecting 1/30th of the benefit ($100). This minimal effect will not satisfy the actuarial concerns nor will it solve the labor market problem because the participant will still receive the lion's share of the benefit even if engaged in prohibited reemployment under the new rule. By the time the new rule has substantial effect, the actuarial and market conditions will have likely changed yet again. In practical effect, the Seventh Circuit's interpretation means that a pension plan may as well not amend the rules to be stricter because they will have little effect. Further, the pension plan will be loathe to liberalize the rules for fear that they will be stuck with those rules in perpetuity.

Central States' own experience is instructive on this point. Central States amended its suspension rules, in part, because its experience was that more and more participants were using the early retirement benefit not for retirement, but instead as an income supplement as they took new positions in the same job classifications and/or same industries covered by Central States. The holding in *Heinz*, if left undisturbed by the Court, would prevent Central States, as well as other pension funds, from making just the sort of adjustment

contemplated by Congress when it enacted 29 U.S.C. § 1053(a)(3)(B).

The transitory nature of the labor market also explains why the Seventh Circuit's reliance on cases such as *Bellas v. CBS, Inc.*, 221 F.3d 517 (3rd Cir. 2000), and *Ahng v. Allsteel, Inc.*, 96 F.3d 1033 (7th Cir. 1996), is misplaced. In those cases, the plans in question attempted to change the *eligibility* rules for benefits that had already accrued. Thus, for example, instead of allowing a participant to qualify for a benefit at age 55, the threshold would be changed to age 60. In these circumstances, the eligibility is changed by conditions *outside of the participant's control and contrary to the settled expectation of the participant.* In contrast, with respect to suspension of benefits rules, it is the participant that controls whether the benefit payments will be received by choosing to engage, or not engage, in prohibited reemployment.

Further, it is unreasonable to assume that the settled expectations of participants are being upset. As emphasized, the labor markets are constantly shifting, and a participant, particularly, but not necessarily, a participant who has not yet retired, cannot assume that any particular employment will be available (or will remain available) when deciding to retire.[4] Unlike a condition for eligibility for benefits such as age or years of service where a participant knows with certainty that, if those thresholds are met, they will be eligible for a benefit,

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[4] Unlike the changes made by Petitioner in this case, Central States only applied its changes to participants that retired after the effective date of the changes. Thus, any participant that retired after the changes went into effect would know precisely what rules applied in making the decision whether to retire. However, even though the participant would have no expectation as to future employment *prior* to retiring, the Seventh Circuit suggests in dicta that it would prevent a new prohibited reemployment rule from applying except with respect to benefits accruing after the change. *See Heinz*, 303 F.3d at 806 n.6.

no such certainty exists with respect to the availability of jobs in the labor market in the future.

Moreover, a plan that desires to change its prohibited reemployment rules in response to changes in the labor market (*i.e.*, changes which are causing an unanticipated and costly flood of early retirements) would not be manipulating its plan rules to account for a "contingent" event that is within the plan sponsor's control. Some courts have held that "plant shutdown" or "job separation" early retirement benefits are protected by the anti-cutback rule, even though the events that trigger these benefits are contingent upon an event (the shutdown) that has not taken place at the time the plan is amended. *See, e.g., Bellas*, 221 F.3d 517. But in the "plant shutdown" cases, the plan sponsor/employer can control whether, in fact, the plant will shutdown. Thus, there may be legitimate concerns that the plan sponsor would manipulate the elimination of the plant shutdown benefits precisely because it had already *planned* to shutdown the plant that would otherwise trigger the availability of the benefits. There are no similar concerns for manipulation of "contingent" events in the context of prohibited reemployment rules. The plan sponsor cannot control or cause the labor market conditions and changes that may prompt a change in the prohibited reemployment rules. Further, in the multiemployer context, the plan sponsor typically consists of the Board of Trustees made up of an equal number of trustees appointed by employers and the union. In this setting, the chances of manipulation that are present in the single employer context are minimal because, unlike the single employer context, the plan sponsor is not the employer itself.

In sum, the Seventh Circuit's interpretation ignored the textual differences between the term "reduce" as compared to the term "suspension" by focusing on the policy animating 29 U.S.C. § 1054(g). That policy, to protect accrued benefits from being changed by factors outside of the participant's

control, and contrary to settled expectations, does not apply to suspension which are, in fact, within the participant's control. Further, the Seventh Circuit's interpretation ignores the policy animating 29 U.S.C. § 1053(a)(3)(B), in allowing a plan to protect its participant base, and hence its actuarial health, by changing the suspension rules to account for shifting market conditions. If Congress wanted to have 29 U.S.C. § 1054(g) apply to suspensions, it easily could have said so as it distinguished the terms throughout ERISA. The policy behind 29 U.S.C. § 1054(g) cannot override the statutory text, particularly so in this case where the policy animating 29 U.S.C. § 1053(a)(3)(B) would be overridden as a result.

CONCLUSION

The Court should reverse the decision of the Seventh Circuit based upon the holding that an amendment to suspension of benefits rules cannot constitute a violation of 29 U.S.C. § 1054(g).

Respectfully submitted,

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IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF FOR THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. May a defined benefit pension plan that complies with the procedural requirements of ERISA Section 203(a)(3)(B) and Tax Code Section 411(a)(3)(B) permanently forfeit early retirement payments during time periods when a reemployed participant remains in suspendible employment?

2. If a subsidized early retirement "payment" was available, but not payable for a specific month due to an ERISA authorized suspension, must the plan's formulae that measure his or her accrued benefit or his or her early retirement benefit be adjusted upward to reflect the value of the payment the participant lost by remaining in suspendible employment?

3. Will such an upward actuarial adjustment be required by ERISA Section 204(g) and Tax Code Section 411(d)(6) with respect to an early retiree who "unretires" (by returning to employment) if a plan's original narrower suspension of benefits rule was broadened to the full extent permitted by ERISA Section 203(a)(3)(B) and Tax Code Section 411(a)(3)(B) after his or her suspendible reemployment commenced?

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INTEREST OF THE *AMICUS CURIAE*

The Society for Human Resource Management ("SHRM")[1] is the world's largest association devoted to human resource management. Founded in 1948, SHRM has more than 500 affiliated chapters within the United States and represents the interests of more than 175,000 individual members. SHRM's mission is to serve the needs of human resource professionals by providing resources to advance the human resource profession and assisting them in developing and executing organizational human resource strategies. Such strategies include the development, design and administration of retirement and other employee benefit plans. SHRM also represents the interests of its members in connection with legal, and other developments that have an impact of their ability to successfully operate such employee benefit programs and other human resources practices or programs.

SHRM regularly represents the interests of its members in important employee benefits and other human resource matters before the courts, Congress, the Executive Branch and independent regulatory agencies. Such representation is a significant aspect of SHRM's activities. In the past SHRM advanced those interest by filing *amicus curiae* briefs in employee benefits and labor relations litigation. For example, SHRM filed amicus curiae briefs in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002); *Circuit City Stores, Inc. v. Adams*, 535 U.S. 1112 (2002); and *Pollard v. E.I. Dupont deNemours & Co.*, 532 U.S. 843 (2001).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae,* SHRM, states that no counsel for a party authored this brief in whole or in part, and no persons other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties pursuant to Supreme Court Rule 37.3. Counsel for the parties informed *amicus curiae* that they have filed blanket consents that include consents to filing of this brief.

Many of SHRM's members sponsor defined benefit pension plans with early retirement features and benefit suspension practices developed at great cost in reliance upon agency interpretations of the Employee Retirement Income Security Act of 1974[2] ("ERISA") suspension of benefit rules. The ability of SHRM members to meet their defined benefit plan sponsorship and administration obligations depends to a large extent on their ability to rely upon such settled interpretations of law and apply those principles to a wide variety of unique factual circumstances.

SHRM and its members firmly believe that defined benefit pension plans will be seriously disrupted if the decision below is affirmed. Specifically, they are deeply concerned because the decision below would expand the scope of the ERISA anti-cutback provision beyond its intended scope. This unwarranted interpretation will result in significant new plan benefit and plan administration costs that, because of the broad applicability of the reasoning employed by the Seventh Circuit majority, is not limited to multiemployer plans.[3]

The benefit suspension rules applicable to reemployed early retirees are a well established exception to ERISA's vesting rules. Those rules reflect a Congressional judgment that when early retirees are reemployed in suspendible employment, their plans and plan sponsors should be free of the vesting rules that might otherwise require double-dipping, simultaneous payment of current wages and retirement benefits to participants who "unretire." Such unexpected benefit entitlements could drain plan assets and dilute the retirement

[2] Pub. L. No. 93-406, 88 Stat. 829 (1974).

[3] The precise change considered below, a change in the scope of the "industry employment" component of suspendible employment, is only relevant to multiemployer plans. However, the ruling below would be equally applicable to amendments to other aspects of the definition of suspendible employment that apply to all qualified plans and to changes in the suspension procedures followed by other qualified plans.

security of other participants. They would have a long-term, sustained impact on employer plan funding costs. Moreover, because of widespread concerns about plan funding due to the so-called "Perfect Storm" of market losses, low interest rates and the virtual disappearance of the traditional 30-year Treasury Bond benchmark rate used by pension plans, this additional judicially-created liability could have a material adverse impact on employer financial statements.

SUMMARY OF THE CASE

Facts. Although this Court has before it only matters relating to Mr. Heinz' claim of a continuing right to receive the subsidized early retirement benefit payments that have been suspended by Petitioner, the conflict between the decision below[4] and the Fifth Circuit's decision in *Spacek v. Maritime Association*[5] and the striking similarity of their relevant facts invite comparison of the claims asserted in both cases.

In each case, distribution of a participant's ERISA retirement plan benefits commenced when he retired from employment covered by a multiemployer plan with enough service to qualify for a fully subsidized early retirement benefit. Specifically, the participants had retired early, that is, before the plans' normal retirement at age 65. Moreover, they had each attained sufficient pension service credits for an unreduced early retirement benefit, that is, they each were receiving an early retirement benefit in the same monthly amount as the monthly benefit they could have received for the same service beginning at normal retirement age.[6]

[4] *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802 (7th Cir. 2002).

[5] 134 F.3d 283 (5th Cir. 1998).

[6] *Spacek*, 134 F.3d at 286 (Spacek retired at age 51 with 30 years of service); *Heinz*, 303 F.3d at 803 (Heinz retired at 39 with 30 pension

In both cases, payment of early retirement benefits ceased under the plans' suspension of benefit rules because the participants did not remain retired, but resumed employment which the plans treated as suspendible employment. In *Heinz*, the return to active employment in the industry covered by the plan did not initially result in application of the plan's benefit suspension rules because the new employment was not covered by those rules until a plan amendment expanded the categories of employment that would trigger a benefit suspension.[7] In *Spacek*, the plan granted broad authority to make plan amendments and in *Heinz* the existence of such authority was apparently not questioned. In neither case was it alleged that the suspension was applied retroactively to monthly payments payable prior to the amendment.

Holdings Below. Neither Circuit's opinion turns upon an interpretation of the suspension of benefit rules of ERISA Section 203(a)(3)(B) or Tax Code Section 411(a)(3)(B).[8] Both opinions assume the plans' suspension of benefit rules, as written, complied with these provisions.[9] Moreover, neither opinion questions the plans' compliance with the

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credits, a combination of age and service). The term "subsidized" refers to the fact that the value of the early retirement benefit exceeds the reduced benefit which would be actuarially equivalent to the normal retirement benefit). The early retirement benefits in question were "fully subsidized," which means there was no actuarial reduction at all. A fully subsidized early retirement benefit is referred to as an "unreduced" early retirement benefit.

[7] Mr. Spacek was reemployed after the amendment was adopted.

[8] ERISA § 203(a)(3)(B); 29 U.S.C. § 1053(a)(3)(B); I.R.C. § 411(a)(3)(B).

[9] *Spacek*, 134 F.3d at 287-88 ("[W]e conclude the Plan's application of the Amendment to Spacek violated neither the Plan's statutory nor contractual obligations"); *Heinz*, 303 F.3d at 804 ("[P]laintiffs do not contend that the restrictions on post-retirement employment contained in the plan, either before or after the 1998 amendment, violate these restrictions.").

procedural rules applicable to suspensions of benefits, including the requirement of notice prior to actual benefit suspension.[10] The holdings expressed by the Fifth Circuit in *Spacek* and the majority in *Heinz* rest instead upon contradictory interpretations of the anti-cutback rules of ERISA Section 204(g).[11]

SUMMARY OF ARGUMENT

In order to prevent double-dipping simultaneous receipt of paid wages and retirement benefits, ERISA explicitly authorizes plans that follow required specific prior notification and other benefit suspension procedures to permanently forfeit a participant's subsidized early retirement payments. This right to forfeit early retirement payments only applies to a specific month's payment if the reemployed participant fails to resume retirement status, reduce his or her hours to part-time status, or transfer to employment in another industry or geographic area.

In its ruling below, the Seventh Circuit majority mistakenly deemed the term "suspension" and the terms "reduce" or "eliminate" as interchangeable. This mistake was related to and complicated by the failure of that Court to distinguish between: (i) "payments" for particular months, that may be permanently forfeited under the suspension rules; and (ii) the plan's early retirement formulae that merely measures a *potential* flow of monthly payments, that remain available if the participant decides to stay retired, return to retirement

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[10] *Spacek*, 134 F.3d at 287-88; *Heinz*, 303 F.3d at 804. Benefits may only be suspended for a given month if prior to that month the participant has actually received personal written notification of the impending suspension. 29 C.F.R. § 2530.203-3(b)(4). *See also* note 8 *infra* & accompanying text.

[11] ERISA § 204(g); 29 U.S.C. § 1054(g). *Spacek*, 134 F.3d at 288-92; *Heinz*, 303 F.3d at 804-13. See also I.R.C. § 411(d)(6); Treas. Reg. § 1.411(d)-4.

status, reduce his or her hours of employment or seek employment in a different industry or area. These distinctions must be recognized as significant since they are consistent with the text of the statute, the legislative history, interpretive agency regulations and the common understanding of the term "suspension" under similar statutory schemes at the time ERISA was enacted.

Based upon its mistaken constructions of these statutory terms, the Court below gave the ERISA anti-cutback rule an expansive interpretation that is not textually compelled, interferes with the intended operation of the ERISA suspension rules and unduly restricts normal plan changes needed to keep pace with industry and employment changes.

Respondent misstated the ERISA suspension rules. He asks this Court to take the unwarranted step of creating a new right to double-dipping continued receipt of retirement payments or their economic equivalent despite a participant's return to paid employment.

ARGUMENT

A. The Court Below Would Prohibit What ERISA Explicitly Authorizes, Permanent Forfeiture of Early Retirement Payments While a Reemployed Retiree Remains in Suspendible Employment.

Defined benefit plans are designed to achieve cost efficient risk shifting of retirement burdens within large groups. Such plans ordinarily pay benefits in the form of life annuities or joint life annuities to former employees and their spouses or other beneficiaries. Both long-lived and short-lived retirees entitled to an annuity receive that benefit during their retirement years based upon their actual life span (and that of their beneficiaries).[12] This has the effect of redirecting plan

[12] ERISA §§ 3(22), 204(c)(2)(B) & 205(a); 29 U.S.C. §§ 1002(22), 1054(c)(2)(B) & 1055(a); I.R.C. §§ 401(a)(11), 411(a)(9) & 417.

assets from those with the least need (short-lived retirees or beneficiaries) to those with the greatest need (retirees or beneficiaries who superannuate).[13] The premise of such a payment scheme is that retirement annuities replace income the participants earned prior to retirement from their employment services and that they have ceased to receive due to retirement.

The suspension of benefits rules of ERISA (ERISA Section 203(a)(3)(B) and Code Section 411(a)(3)(B)) serve to protect plan assets from being depleted by double-dipping payments, e.g., continued payment of early retirement benefit payments that are not needed to replace a participant's wage or salary income because the retiree has returned to paid employment. The mechanical operation of the ERISA suspension of benefits rules as implemented by Petitioner Plan cannot be clearer. A participant's early retirement benefits will continue to be paid during months in which he or she remains "retired," in the sense that he or she does not engage in suspendible employment. During months the participant "unretires," by engaging in suspendible employment, the monthly early retirement benefit will not be paid.

The suspension of benefits rules applicable to Petitioner and other multiemployer plans are part of ERISA's minimum vesting rules. The ERISA vesting rules distinguish between impermissible forfeitures of a participant's normal retirement

[13] *Id.* Defined benefit plans may be likened to a lottery or casino. However, instead of the "house" or the lottery sponsor having an overwhelming edge, the plan participants as a whole have the advantage. But individual participants sometimes lose if they die before retirement or they do not live very long in retirement. On average most employees may survive for a period approximating their life expectancies. However, some retirees will superannuate. These retirees are the "big winners" under a defined benefit plan because they experience the greatest benefits from the risk-spreading characteristics of such plans. They are also likely to be the "biggest losers" in defined contribution plans.

benefit formula amount, the "accrued benefit," and suspension of a particular benefit payment, which is a permitted forfeiture:

> (B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—
>
> (i) ***
>
> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan as when such benefit commenced*** .[14]

The House Education and Labor Committee description of the intent of the suspension of benefits exception contained in the House-passed version of ERISA clearly reflects that the suspension of benefits exception was designed to permit forfeiture of otherwise available early retirement benefit payments, i.e., both permanent early retirement benefits that could continue beyond 65 and, more broadly, supplemental benefits that are payable only prior to age 65:

> *Permitted forfeitures of vested rights.*—*** [A] plan is permitted to suspend payment of benefits while the participant is working for the employer (for example, where an early retiree returns to work to increase his subsequent pension benefits). In the case of a multiemployer plan, the benefits may be suspended if the employee has resumed employment in the same industry even though not with the same employer. These rules are not to prevent suspension of part of an early retirement supplement (such as a so-called social security supplement) on account of reemployment, even with another employer or in another industry.[15]

[14] ERISA § 203(a)(3)(B); 29 U.S.C. § 1053(a)(3)(B). *See also*, I.R.C. § 411(a)(3)(B).

The operation of the suspension of benefits rule was further explained by a Floor Manager during the Senate debates prior to passage of the Conference version of ERISA. In this explanation another rationale for the suspension of benefits rule was offered, that is, a desire to protect high wage

[15] 120 CONG. REC. H 3977, at H 3990 (extension of remarks of Rep. Carl D. Perkins, Chair of the House Education & Labor Committee regarding the substitute version of HR 2)(daily ed. Feb. 25, 1974), *reprinted as*, II SUBCOMM ON LABOR, SENATE COMMITTEE ON LABOR AND PUB. WELFARE, 94TH CONG., 2D SESS, LEGISLATIVE HISTORY OF ERISA, 3293, at 3326 (Committee Print 1976). After reporting HR 2, the Committee on Education and Labor authorized its Chairman to replace the text of HR 2, as previously reported, with a substitute that combined elements of HR 2 and HR 12906. The description of that substitute, which was the bill that passed in the House, was contained in a Committee materials quoted in the text accompanying this note. Those materials were described by the Chairman as "in the nature of a committee report." Id. at 3293. This material was not separately printed prior to passage, but was printed as part of the Congressional Record as an extension of Chairman Perkins' remarks. The comparable Ways and Means Committee Report contained an identical description of this provision. H.R.Rep.No. 93-779, 93D CONG. 2D SESS., at 58 (1974).

While the House passed language described by Chairman Perkins was more sketchy than the final text of ERISA, it contained all the critical elements relevant to this case. The House version read as follows:

> [A] right to an accrued benefit shall not be treated as forfeitable merely because the plan provides *** that payment of benefits is suspended during periods when the participant has resumed employment with the employer (or, in the case of a multiemployer plan, has resumed employment in the industry before normal retirement age); ***.

H.R. 2, §3(19), 93D CONG, 2D SESS. (1974) (as passed in the House on February 28, 1974 and printed in the Senate on March 6, 1974), *reprinted as*, III SUBCOMM ON LABOR, SENATE COMMITTEE ON LABOR AND PUB. WELFARE, 94TH CONG., 2D SESS, LEGISLATIVE HISTORY OF ERISA, 3898, at 3909 (Committee Print 1976).

employers and their employees from downward wage pressures due to the ability of industry competitors to rehire its retirees at lower wages due to continuation of their early retirement benefits:

> The conference substitute provides that subject to regulations of the Secretary of Labor, a plan may be permitted to suspend the payment of pension benefits when a retiree returns to work for the employer who is paying such benefits. In addition, a multiemployer plan would be permitted to provide, subject to regulations, that payment of benefits may be suspended when a retiree returns to work in the same industry, in the same trade or craft, and in the same geographical area as that covered by the plan. The type of suspension contemplated by this provision are those which prevent plan assets from being used to pay retirement benefits to persons who have, in fact, returned to work for employers covered by the plan. Also contemplated are provisions designed to protect participants against their pension plan being used. in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of employees covered by the plan.
>
> It is expected that regulations issued by the Secretary would not permit use of suspension provisions where they are not necessary to deal with the types of situations I have described. Moreover, while such regulations may, as appropriate to particular industry conditions such as those characterized by casual and intermittent employment, provide that benefits can be suspended not only for the exact number of days or hours of employment, but for a reasonable period of time during which the employment occurs, such regulations should preclude such suspensions which are not necessary to effectuate the policies I have mentioned.[16]

[16] 120 Cong. Record S15739 (statement of Sen. Harrison Williams during ERISA Debates) (daily ed. Aug. 22, 1974).

Thus, whatever purpose is viewed as paramount, there can be no doubt that Congress intended the suspension of benefit rules to permit a suspension of payments that were otherwise available to early retirees if they did not resume their retired status after receiving a warning their benefits would be suspended.

Such suspensions of payments otherwise actually available are not viewed as a reduction of the participant's "accrued benefit," i.e., the formula measurement of the participant's potential benefit. Unlike the suspension exception that focuses upon specific benefit payments during a discrete period of re-employment, the term "accrued benefit" deals with the measurement of a participant's entire potential benefit:

> (23) The term "accrued benefit" means—
>
> (A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit commencing at normal retirement age;[17]

Standing alone, even the accrued benefit formula is not itself a right to an actual benefit payment. Something else has to happen first before a participant will become entitled to an

[17] ERISA § 3(23); 29 U.S.C. § 1002(23). ERISA added a nearly identical definition to the Tax Code. I.R.C. § 411(a)(7)(A)(i).

ERISA also offers a definition of the term normal retirement age that generally refers to the earlier of the normal retirement age specified in the plan or the later of age 65 or the completion of 10 years of plan participation. ERISA § 3(24); 29 U.S.C. § 1002(24). *See also*, I.R.C. § 411(a)(8). The current text of these provisions is unchanged with the sole exception that the 10 years of plan participation prong of the statutory default definition of normal retirement age was reduced to five years in two stages. *Compare*, Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9203(b)(1), 100 Stat. 1874 (1986), *with*, Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7871(b)(2), 103 Stat. 2106 (1989). *See also*, Treas. Reg. § 1.411(a)-7(b).

actual benefit payment. For example, the participant must perform sufficient service to have a vested right and the participant or his beneficiary must survive long enough to receive plan payments.[18] Thus, even the accrued benefit formula is just a measure of benefit availability, not an actual benefit payment. To be sure, the payments that a participant eventually receives will be based upon that measurement, should the participant become vested and survive until his or her benefit commencement date.

Although subsidized early retirement benefits are determined with reference to the accrued benefit, they are not considered a part of the accrued benefit. Elsewhere in the ERISA vesting rules it is specified that available subsidized early retirement payments are disregarded in determining benefit accruals.[19]

Thus, ERISA protects the "opportunity" to receive actual payment of benefits based upon the accrued benefit formula, including early retirement payments. But ERISA does not necessarily protect the available "payment" itself. As noted above with respect to service vesting, and as discussed in greater detail below regarding the other vesting rules, failure of a participant to meet all the qualifications for vesting may

[18] *See* notes 12 & 13 *supra* and 25, 28, 29, 31 & 45 *infra* & accompanying text.

[19] ERISA §204(b)(1)(H)(v); 29 U.S.C. § 1054(b)(1)(H)(v); I.R.C. § 411(b)(1)(H)(iv). The Secretary of Labor was initially authorized to issue regulations interpreting these parallel "accrued benefit" and "early retirement subsidy" provisions, but that authority, other than the authority directly related to the suspension of benefit rule itself, was subsequently transferred to the Treasury Department. Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47713, 92 Stat. 3790, as amended by Pub. L. No. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095, codified at 5 U.S.C. Appendix 1. The Treasury Department exercised this authority by construing this definition of a participant's "accrued benefit" as excluding subsidized early retirement benefits. Treas. Reg. § 1.411(a)-7(a)(1)(ii).

lead to forfeiture of fully available benefit payments,[20] while at the same time leaving unaffected the opportunity to receive the other payments if the vesting deficiency is subsequently remedied by, for example, a resumption of retirement, reduction in hours to part-time status or employment in another industry or area. Of course one forfeiture event, death, cannot be remedied.

In the Preamble to the final suspension of benefit regulations, the Department of Labor offered a detailed discussion of the impact of the suspension of benefit rules as the exclusive method whereby a plan may permanently forfeit early retirement payments of persons who are reemployed:

> *Early retirement benefits.* The Department is aware that certain plans provide that under certain circumstances a plan participant may be entitled to begin receiving pension benefits prior to attainment of normal retirement age under the plan. The applicability of the regulation in the case of an early retiree was discussed in footnote 9 to the preamble of the proposed regulation. There the Department noted that because section 206(a) of the Act, section 401(a)(14) of the Code and the regulations thereunder require a plan only to pay the actuarial equivalent of the normal retirement benefit to an early retiree, a plan would not be prohibited from ceasing payment of benefits to an early retiree for any reemployment, so long as such benefits were actuarially recalculated in order to compensate for the temporary withholding, and if payment of benefits under the recalculation began no later than normal retirement age. The Department stated, however, that if a plan intended to withhold permanently the benefits of an early retiree, then the plan would be permitted to do so only in the circumstances described in the regulation
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> * * *

[20] *See* notes 12 & 13 *supra* and 25, 28 & 29 *infra* & accompanying text.

[I]t is the Department's view that sections 203(a) and 206(a), as here relevant, are designed to protect a plan participant's right to receive a normal retirement benefit or its actuarial equivalent. When a plan provides the actuarial equivalent of a normal retirement age, a permanent withholding of a portion of such early retirement benefit would effect a forfeiture of a portion of the affected employee's normal retirement benefit that would have commenced at normal retirement age. The Department does not believe that, by commencing actuarially reduced benefits before normal retirement age, a plan is permitted to subject such benefits to forfeiture under circumstances other than those permitted under the Act. Accordingly, it is the Department's position that a permanent withholding of benefits payable prior to normal retirement age due to the early retiree's return to employment, to the extent that such withholding would effect the integrity of the actuarial equivalent of the normal retirement benefit, may be imposed only in a manner consistent with the requirements of section 203(a)(3)(B) and the regulation.[21]

Thus, a plan may permanently forfeit payments that are otherwise available to a reemployed early retiree by complying with suspension procedures spelled out in these regulations. If those procedures are not followed, an actuarial adjustment of the sort sought by the Respondent may be required.[22]

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[21] Preamble to 29 C.F.R. § 2530.203-3, *printed at* 46 Fed. Reg. 8894, Part (B) "Scope of Regulation" Jan. 27, 1981).

[22] Mr. Heinz' early retirement benefit was unreduced (i.e., fully subsidized in that the equivalent benefit at 65 was entirely unaffected by any early payments). Therefore, while other early retirees with early benefits that are not fully subsidized would be entitled to an upward actuarial adjustment for ERISA non-compliant suspensions, Mr. Heinz would not be.

For the reasons discussed above, this Department of Labor explanation of the distinction between ERISA Section 203(a)(3)(B) compliant suspensions and non-compliant suspensions and the text of its regulation are consistent with the text of ERISA and its legislative history. Moreover, because of this consistency and the fact that the Department of Labor was granted broad authority to issue such interpretive regulations and develop suspension procedures,[23] this interpretation is entitled to great deference.[24]

The principle that an available early retirement payment may be lost to the participant through an ERISA compliant suspension without diminishing his or her "accrued benefit" or triggering an upward actuarial adjustment is further reenforced by the different treatment of suspensions before and after normal retirement age. Unlike an early retirement benefit which, if properly suspended, has no impact on the accrued benefit, a suspension of a normal retirement benefit does have an impact on a participant's accrued benefit. After normal retirement, suspension is still possible, but the

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[23] ERISA §§ 203(a)(3)(B) & 505; 29 U.S.C. §§ 1053(a)(3)(B) & 1135. *See also*, Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47713, 92 Stat. 3790, *as amended by* Pub. L. No. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095, codified at 5 U.S.C. Appendix 1. As the preambles to the proposed regulations, the final regulations and an amendment to the proposed regulations make clear, this regulation was developed over a three year period based upon the Department of Labor's considered review of the text of the statute, the legislative history and numerous public comments on the proposed and final regulations. Preamble to Proposed 29 C.F.R. § 2530.203-3, *printed at* 43 Fed. Reg. 59048 (Dec. 19, 1978); Preamble to final 29 C.F.R. § 2530.203-3, *printed at* 46 Fed. Reg. 8894 (Jan. 27, 1981); Preamble to revised final 29 C.F.R. § 2530.203-3, *printed at* 46 Fed. Reg. 59243 (Dec. 4, 1981).

[24] *Chevron U.S.A., Inc. v. Natuarl Resources Defense Council*, 467 U.S. 837 (1984). *See generally*, William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, LEGISLATION AND STATUTORY INTERPRETATION, 312-28 (2000) [hereinafter cited as "STATUTORY INTERPRETATION"].

consequences are different under the suspension of benefits rules. When a normal retirement benefit is suspended, it then may become necessary to adjust the participant's accrued benefit upward to compensate the participant for the lost payments, a requirement wholly inapplicable to proper suspensions prior to normal retirement age.[25] Thus, where Congress wanted to establish a linkage between a suspended benefit and the measurement of the participant's accrued benefit it knew how to do so and did so in an intentionally limited fashion that has no impact on suspensions of subsidized early retirement benefits.

Defined benefit pension plan sponsors, including Petitioner, Central Laborers' Pension Fund, and SHRM's members must be able to rely upon ERISA's early retirement and benefit suspension provisions and agency interpretations of those rules.

B. The Court Below Failed to Distinguish Between: (i) Payments that may be Permanently Forfeited During a Period of Suspension; and (ii) Early Retirement Formulae that Merely Measure a *Potential* Flow of Monthly Payments That Remain Available if a Participant Decides to Stay Retired, Return to Retirement Status or Seek Employment in a Different Industry.

It is uncontested that ERISA's anti-cutback rule operates to protect Respondent's accrued benefits from diminishment and prevents the Petitioner from withdrawing the *availability* of the subsidized early retirement benefit:

> (g)(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, ***

[25] ERISA §§ 204(b)(1)(H)(iii)(II) & (b)(1)(H)(v); 29 U.S.C. §§ 1054(b)(1)(H)(iii)(II) & (b)(1)(H)(v); I.R.C. §§ 411(b)(1)(H)(iii)(II) & (b)(1)(H)(iv).

> (2) For purposes of paragraph (1), a plan amendment that has the effect of—
>
> (A) eliminating or reducing an early retirement benefit or retirement-type subsidy (as defined in regulations), or
>
> (B) ***.
>
> With respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy***.[26]

The disagreement between the parties concerning this provision stems from the Seventh Circuit majority's view that the forfeiture of the early retirement subsidy payments that the Respondent could have received had he remained in (or returned to) retired status was the same as an "elimination" or "reduction" of the Respondent's early retirement subsidy. The Seventh Circuit reached this conclusion even though that early retirement subsidy remained available to Respondent and would have been paid to him if he had resumed retirement or sought non-industry employment after he received notice of the pending suspension.

As described above,[27] the regulations that have construed the interplay between the ERISA vesting and accrual rules treat subsidized early retirement benefits, not as a permanently vested parts of a participant's accrued benefit, but merely as subsidized benefit payments that are available to the participant in the sense that the participants may avail themselves of those forfeitable payments by remaining retired or by promptly discontinuing suspendible employment after

[26] ERISA § 204(g); 29 U.S.C. § 1054(g).

[27] *Supra* note 19.

receiving a suspension notice. Moreover, as described in (A) above, those interpretations are consistent with the text of ERISA and with the legislative history of the suspension rules. Under the suspension rules, the early retirement subsidy is not eliminated or reduced, but remains fully available in the same unchanging monthly amount. Participants will receive those payments if they take the steps necessary to vest in those payments—in this case, by not remaining in suspendible reemployment.

Also as discussed above, a participant's accrued benefit formula is always the basis for determining the actual payments that the participant may receive once circumstances exist that entitle the participant to receive a benefit payment. Standing alone, however, an accrued benefit and any early retirement subsidy that is calculated with reference to the normal accrued benefit are merely potential benefit amounts and not actual benefit payments. The potential benefit will not become (or remain) an actual benefit payment entitlement if the circumstances necessary for payment to commence (and continue) do not exist.

There are other examples of the proper treatment of a participant's accrued benefit as a measurement of a potential or available benefit that cannot be reduced or forfeited, but may never be paid. If a participant in a defined benefit plan dies before benefits commence without a surviving spouse, or without electing a benefit form that provides for survivor payments to another beneficiary, then the participant's accrued benefit, though not eliminated or reduced, will never be paid to or for his or her benefit.[28] Instead a mortality gain will arise that benefits the plan and, through more secure funding, all other participants.[29] Similarly, if a participant

[28] ERISA §§ 3(22), 204(c)(2)(B) & 205(a); 29 U.S.C. §§ 1002(22), 1054(c)(2)(B) & 1055(a); I.R.C. §§ 401(a)(11), 411(a)(9) & 417.

[29] *Compare* ERISA §§ 3(31), 302(b)(2)(B)(iv) & 302(b)(3)(ii); 29 U.S.C. §§ 1002(31), 1082(b)(2)(B)(iv) & 1082(b)(3)(ii); I.R.C.

could receive a subsidized early retirement benefit at age 55 in the same amount as a normal retirement benefit, yet he or she does not retire at all until age 65, then the value of the subsidy (the ten years' worth of payments he or she could have received by retiring early), although not eliminated or reduced, will never be paid by the plan. When the participant actually retires at age 65 his or her normal benefit will not be increased because of the prior availability of those potential, but unpaid, early retirement payments.[30] Instead, the participant continues receiving a wage or salary for those ten years of continuous employment.

§§ 412(b)(2)(B)(iv), (b)(3)(ii) & (l)(2)(D), (l)(3)(D)(ii)(II), (l)(7)(C) & (l)(10), *and* Treas. Reg. §§ 1.412(c)(1)-1(b), 1.412(c)(3)-1, *with*, Felicia A. Finston, *Plan Qualification—Pension and Profit Sharing*, BNA TAX MANAGEMENT & COMP PORTFOLIOS, Portfolio 351-4th, at IV(B)(5) (2003), STAFF OF JOINT COMM ON TAXATION, 101ST CONG., 2D SESS.,STAFF DESCRIPTION OF PRESENT-LAW TAX RULES RELATING TO QUALIFIED PLANS, at 45 (1990) (JCS-9-90), *Denton v. First National Bank of Waco*, 765 F.2d 1295, 1298 n. 5 (5th Cir. 1985), *and, Carnation Co., Inc. & Central States Pension Fund*, 9 E.B.C. 1409, 1424 (Nagle, Arb.) (1988) (AAA No. 51 621 0023 84). *See also*, IRS Examination Guidelines, Announcement 98-1, 1998-2 I.R.B. 38 (1/12/98).

[30] *See* note 32 *infra* & accompanying text. As noted above, this actuarial adjustment may be required for suspensions after normal retirement age even if the ERISA suspension rules are complied with. If a participant works past age 65 or returns to work after age 65, his or her benefit may still be suspended, but the "lost" payments may increase his or her accrued benefit. ERISA § 204(b)(1)(H)(iii)(II); 29 U.S.C. § 1054(b)(1)(H)(iii)(II). This different treatment of suspensions after age 65 demonstrates that Congress knew how to require an increase in an accrued benefit on account of an ERISA authorized benefit suspension, but chose not to impose any such requirement for ERISA compliant benefit suspensions prior to age 65.

As discussed below, in this respect the ERISA suspension of benefit rules operate in a manner that is similar to the operation of the Social Security retirement earnings test at the time ERISA was enacted. *See* notes 34-35 *infra* & accompanying text.

Further, as described above, the suspension of benefits rules work in a similar fashion in cases of reemployment. Although participants are protected from the diminishment or elimination of the formula for the early retirement subsidy benefit, if they "unretire" for a period of time under the principles set forth in ERISA Section 203(a)(3)(B) and Code Section 411(a)(3)(B), they will have no vested right to the payment that could have been made for those months, provided the plan complies with the personal notification requirements that afford the participant with prior notice of the suspension and the opportunity to avoid the suspension by resuming retired status, reducing his or her hours or seeking non-industry employment or employment in another area. This suspension in no way reduces or eliminates the potential subsidized early benefit formula, but during a month when no benefit is actually payable, that unchanged early retirement benefit remains just a potential benefit—i.e., an available benefit—that the participant passed up in favor of wages or salary for employment services.

In reaching its conclusion that a suspension of actual payment was the same as a cutback in the participant's accrued benefit, the Seventh Circuit majority displayed a fundamental misunderstanding of this distinction between an available payment not availed of because of the participant's failure to qualify (or continue to qualify) for the payment and the accrued benefit yardstick used to measure available, but unused, potential benefit payments. The Seventh Circuit's mistake was that it equated a foregone payment with an accrual formula reduction. Under the statutory scheme those two concepts are not interchangeable. If through his or her own decisions regarding employment, a participant does not properly trigger an available subsidized early benefit payment, that act may result in the permanent loss of that potential payment, but it does not diminish the measurement of the participant's available (but thus far unused) accrued

benefit, the *potential* benefit that is protected by the anti-cutback rule.

The statute, regulations and legislative history all treat the defined term "accrued benefit" as the basic measure of a participant's potential benefit, not necessarily what will, in all events, actually be received. As measured at a particular time (based on the participant's individual career characteristics such as his or her service and compensation), the participant has an accrued benefit whether or not that benefit is vested at all, whether or not it will ever be paid, and regardless of the length of time it will actually be paid. Actual payment depends upon additional facts.[31] If an early retirement subsidy is never paid due to a participant's failure to retire early at all, his or her accrued benefit will not be increased to reflect early retirement subsidy payments he or she chose not to receive.[32]

Congressional use of the term "suspension" to refer to an appropriate interruption of benefit payments after imple-

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[31] For example, the fact that a participant has an accrued benefit attributable to employer contributions, as described in ERISA Section 204(c)(1), does not mean he or she is vested at all in that accrued benefit. Vesting is only required upon performance of the plan's vesting service requirements under ERISA Section 203(a)(2). ERISA §§ 203(a)(2) & 204(c)(1); 29 U.S.C. §§ 1053(a)(2) & 1054(c)(1). Moreover, even a vested benefit may never become payable if, for example, the participant dies without being survived by a spouse or beneficiary, under ERISA Sections 203(a)(3)(A) or 205. *See* notes 28-29 *supra* & accompanying text.

[32] "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] section 203(a)(3)(B)."

Treas. Reg §1.411(c)-1(f). Of course as the participant performs additional service or receive additional compensation, those factors usually will increase the formula benefit amount, a factor along with the receipt of wages and salaries which is one of the incentives that leads early retirees to trade continued subsidized early retirement payments for a return to active employment.

menting procedural safeguards was not unusual terminology. It was consistent with the common description of the operation of other "suspension" provisions that were in effect when ERISA was enacted. For example, at that time Social Security retirement benefits, Social Security disability benefits, welfare benefits, state unemployment benefits and state workers compensation benefits, among others, could only be stopped due to reemployment or other loss of entitlement after procedural safeguards were followed.[33] The closest contemporary analogy to the ERISA suspension approach may have been the treatment of reemployed workers under the Old Age portion of Social Security.

Throughout the history of the Social Security program a return to employment could adversely impact the receipt of otherwise available benefits. Originally, return to any gainful occupation resulted in complete forfeiture of available payments. This feature of Social Security has been changed many times by Congress, including a significant change just two years before ERISA was enacted that parallels the ERISA suspension of benefits methodology. The 1972 Social Security amendments[34] introduced the Delayed Retirement Credit. With this change, the treatment of reemployed persons under Social Security closely mirrored the ERISA approach.

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[33] *See, e.g.*, Social Security Act, §§ 202(w), 203 & 205; 42 U.S.C. §§ 402(w), 403 & 405 (Social Security reemployment/self employment excess earnings); Social Security Act, § 225; 42 U.S.C. § 425 (Social Security disability benefits); *Dillard v. Industrial Comm of Virginia*, 416 U.S. 783 (1974) (state workers compensation); *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973)(state unemployment benefits); *Richardson v. Wright*, 405 U.S. 208 (1972) (Social Security disability benefits); *Calif. Dept. Human Resources Development v. Java*, 402 U.S. 121 (state unemployment benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits); *Wheeler v. Montgomery*, 397 U.S. 280 (1970) (welfare benefits). *See also*, notes 34-35 *infra*.

[34] Social Security Act Amendments of 1972, §§103, 105 & 106, Pub. L. No. 92-603, 86 Stat. 1329 (1972)

When ERISA was enacted, a recipient of Social Security Old Age benefits who elected early retirement would forfeit the entire early retirement payment if he or she earned more than a threshold amount. A reemployed retiree with earnings below that threshold would forfeit a portion of his or her benefits for earnings unless his or her earnings fell below a *de minimis* level. Further, under the Delayed Retirement Credit feature, persons who were reemployed after 65 or whose earlier reemployment continued beyond 65 were still subject to forfeiture of otherwise available current benefits, but their eventual benefits were increased by the credit amount applicable to them to reflect payments otherwise available after age 65. Moreover, reemployed recipients over age 72 were exempted from the suspension of benefits feature of Social Security entirely.[35]

In sum, there is a significant distinction between "reduction" of a benefit formula amount and the "suspension" of a specific early retirement benefit payment which is fully available under a plan's early retirement subsidy formula based upon the plan's accrued benefit formula. Despite the Seventh Circuit's attempt to blur or ignore that distinction, it is a distinction reflected in established plan administration practices that are well grounded in a common sense understanding of the relationship between related statutory provisions and is consistent with the text of those provisions,

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[35] For a detailed description of the evolution of the Social Security retirement earnings test, including the rules in effect when ERISA was enacted, *see generally*, COMM WAYS & MEANS, 101ST CONG., 1ST SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, at 16-18 (Comm. Print 1989) (WMCP: 101-41); Office of the Historian of Social Security, RESEARCH NOTE #7: BRIEF HISTORY OF THE RETIREMENT EARNINGS TEST, *available at, http://www.ssa.gov/history/ret.html*; Social Security, HISTORY OF THE PROVISIONS OF OLD-AGE, SURVIVORS, DISABILITY, AND HEALTH INSURANCE, part I(H) (1999), *available at, http://www.ssa.gov/OACT/HOP*.

the relevant legislative history of those provisions and the common understanding of suspension procedures followed under other statutory schemes at the time ERISA was enacted.

C. The Court Below Expanded the Anti-Cutback Rule Beyond its Intended Scope in a Manner that is not Textually Compelled, Interferes with the Intended Operation of the Suspension Rules and Calcifies Both Rules by Preventing Plan Amendments that Keep Pace with Industry and Employment Changes.

The principles of voluntary plan sponsorship and settlor discretion regarding plan design decisions leave plan sponsors free to exercise reserved plan amendment authority to alter a plan, except to the extent such modifications are specifically prohibited by law.[36] As noted above, Respondent's challenge to the amendment of Petitioner Plan is not based upon any alleged failure of the amendment (or the Plan's prospective implementation of the amendment) to satisfy the requirements of ERISA Section 203(a)(3)(B) or Code Section 411(a)(3)(B).[37] Rather, Respondent's position is based solely upon the ERISA Section 204(g) description of early retirement benefits as a part of the participant's accrued benefit that cannot be eliminated or reduced.[38]

The anti-cutback rule on its face merely protects the formula used to measure a participant's "potential" or "available" benefit. By extending the reach of ERISA Section 204(g) to prohibit benefit payment forfeitures expressly authorized by ERISA Section 203(a)(3)(B) and Code Section

[36] *Cf.*, *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

[37] *Heinz*, 303 F.3d at 804 ("plaintiffs do not contend that the restrictions on post-retirement employment contained in the plan, either before or after the 1998 amendment, violate these restrictions.")

[38] Respondents Brief Opposing Certiorari, at 15-17.

411(a)(3)(B), not just to prevent accrued benefit formula or early retirement subsidy formula reductions or eliminations, the Seventh Circuit majority opinion expanded the reach of the anti-cutback rule. In doing so the Seventh Circuit has infringed upon the proper application of the suspension of benefits rule in a manner that would compromise the rule's capacity to protect plan assets against undue depletion to provide windfall double-dipping payments to participants whose reemployment is inconsistent with the plan's objectives to provide retirement income replacing the income a retiree would otherwise earn from employment.

The Seventh Circuit majority's expansion of the scope of ERISA Section 204(g) is not compelled by the text of that provision and is contrary to the principle that distinct provisions of a statute should be read whenever possible in a manner that harmonizes them and gives meaning to both provisions.[39] Thus, the Seventh Circuit adopted a view of ERISA Section 204(g) that directly clashes with ERISA Section 203(a)(3)(B) and Code Section 411(a)(3)(B). This interpretation treats the ERISA anti-cutback rule amendments as though they were at least a partial implied repeal of the ERISA suspension of benefits rules. Such implied repeals are clearly disfavored.[40]

The Seventh Circuit's view has no support in the legislative history. On the contrary, the view below is even more dubious because it conflicts with contemporaneous evidence

[39] *** [I]t is presumed that Congress uses terms consistently, intends that each provision add something to the statutory scheme, and does not want one provision to be applied in ways that undercut other provisions.

STATUTORY INTERPRETATION, *supra* note 24 at 263. *See, e.g.*, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1985).

[40] STATUTORY INTERPRETATION, *supra* note 24 at 273-74. *See, e.g.*, *Morton v. Macari*, 417 U.S. 535 (1974).

of the intent of the early retirement provision of ERISA Section 204(g) contained in the legislative history of the enactment of that provision. When ERISA Section 204(g) was amended in 1984, the author of the early retirement provision upon which the Court below rests its expansive interpretation of that section expressly disclaimed any intent to curtail the proper operation of the suspension of benefits rule as described above:

> I wish to further clarify the anti cutback provisions of Section 301 of the bill. Those provisions are not intended to apply to benefit changes authorized by existing law*** Nor do those provisions in any way apply to or affect the provisions of ERISA section 203(a)(3)(B) and code section 411(a)(3)(B) relating to the suspension of benefits for postretirement employment, including the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.[41]

Thus, the author of the very language upon which the Seventh Circuit majority relies offered a contemporaneous interpretation of that provision that is inconsistent with the decision below. He made it clear that provision was not intended to interfere with the operation of the suspension of benefit rules. In expressing this view of the legislative intent, Congressman Clay was offering a view that was completely consistent with the principle that specific provisions (the suspension provisions) trump more general provisions,[42] and the preexisting interpretation of the Department of Labor that the suspension rule was a specific rule that trumped another ERISA provision that could have afforded Mr. Heinz the relief he seeks, but for the suspension rules.[43]

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[41] 130 CONG. REC. 23,487 (1984) (statement of Rep.William Clay).

[42] STATUTORY INTERPRETATION, *supra* note 24 at 275.

[43] *See* note 21 *supra* & accompanying text. The Department's view that the suspension provision of ERISA Section 203(a)(3)(B) is sufficiently specific to overcome the more general rules spelled out in ERISA Section 206(a) and Tax Code Section 401(a)(14) lends even more support to Congressman Clay's view. SHRM suggests that in light of Congressman Clay's remarks it should be presumed that in enacting a provision addressing early retirements Congress was aware of the consistent earlier interpretation of the Department of Labor giving primacy to the suspension rules in circumstances where the suspension procedures were followed.

As the *Spacek* court correctly noted, the new provision added to ERISA Section 204(g) was intended to offer subsidized early retirement benefits the same protections afforded other accrued benefits (which are also fully suspendible), not more protection, as is compelled by the logic of the Seventh Circuit majority's holding.[44] Moreover, the differential treatment afforded ERISA compliant pre-65 suspensions, on the one hand, and post-65 suspensions and ERISA non compliant pre-65 suspensions, on the other hand, has been recognized as proper in applicable regulations [45] and, as discussed above, is supported by the express language of ERISA.

ERISA Section 203(a)(3)(B) by referring to industry employment instead of a more precise and limited category of reemployment, left room for changes that would result from ordinary changes in the scope and composition of industries, including plan scope changes that could occur due to mergers, acquisitions, product line expansions, job growth and job and industry contraction. Plainly ERISA Section 203(a)(3)(B) was intended to offer some measure of flexibility. In adopting

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[44] 134 F.3d at 291.

[45] *Compare*, Treas. Reg § 1.411(c)-1(f), *with*, ERISA § 204(b)(1)(H)(iii)(II); 29 U.S.C. § 1054(b)(1)(H)(iii)(II). *See also* notes 21-23 *supra* & accompanying text. Although the authority to issue regulations under ERISA Section 203(a)(3)(B) and I.R.C. § 411(a)(3)(B) was granted to the Department of Labor, the Treasury Department was granted authority to interpret the ant-cutback rules that were enacted in parallel form in ERISA Section 204(g) and Tax Code Section 411(d)(6).

amendments conforming Petitioner Plan's benefit suspension rules to the regulations interpreting that Section, the Plan was merely taking full advantage of the permissive provisions of ERISA Section 203(a)(3)(B) and Tax Code Section 411(a)(3)(B). Because of the prospective impact of any benefit suspension that is required by the prior personal notification requirements of the regulations, Petitioner Plan did nothing more than afford Respondent a choice to remain in employment and forfeit some months of the plan's subsidized early retirement benefit or resume retirement status, reduce his hours or work in another industry or area, and receive the available payments. Respondent's decision to remain in industry employment cost him some early retirement payments, but his accrued benefit, the measure of his available potential benefit, was neither diminished nor eliminated; it was simply not actuarially increased due to the fact he had not yet reached normal retirement age.

These conclusions are consistent with a reading of the statute that gives full reasonable effect to both the anti-cutback and the suspension of benefits provisions. This reading of the two provisions is consistent with the applicable regulations, with the legislative history and with the correctly decided opinion of the Fifth Circuit in *Spacek*.

D. Respondent Misstated the ERISA Suspension Rules and Would Have this Court Create a New Right to Double-Dip in Contravention of those Rules.

Two assertions in Respondents Brief in Opposition to Certiorari merit comment.

First, Respondent offered an *in terrorum* argument that reversal of the Seventh Circuit's decision would permit arbitrary suspensions of the early retirement benefits of all participants for a period of time, presumably without regard to the presence or absence of proof of suspendible reem-

ployment.[46] SHRM contends this assertion vastly overstates the impact of reversal since the suspension forfeitures that would be permitted if the decision below is reversed are only those permitted under the ERISA suspension rules. Under those rules, a reemployment triggering a forfeiture must be suspendible reemployment (i.e., full-time employment in the industry) and such "unretirement" must persist after personal notice.[47] Thus, Respondent's assertion that reversal permits a blanket suspension of all early retirement subsidy payments to all participants is plainly erroneous.

Second, Respondent asserts he has a justifiable expectation and entitlement to have his early retirement subsidy payments continue despite his suspendible reemployment.[48] This assertion is based in part upon: (i) Respondent's assertion there is nothing "magical" about the term suspension; (ii) his free association substitution of the anti-cutback terms "reduction" and "elimination" for the term "suspension;" and (iii) his shift of the object of the anti-cutback protection from the early retirement formula amount (which is its proper object) to the actual payments of early retirement benefits (which are the proper object of the suspension rules and under those rules may be forfeited).[49] This "sleight of hand" is entirely premised upon Respondent's assertion that there is nothing special about the term "suspension." On the contrary, as discussed above, that term is special. It is a term with an established meaning that Congress selected and infused with even more meaning. In doing so Congress took an approach inconsistent with the decision below. Congress infused the term "suspension" with the power to override vesting if a participant who has been reemployed in the industry does not

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[46] Respondents Brief Opposing Certiorari, at 15.

[47] 29 C.F.R. §2530.203-3.

[48] Respondents Brief Opposing Certiorari, at 16.

[49] *Id.*

abandon that suspendible employment by returning to retirement, reducing his or her hours or seeking employment outside the industry or the area. If this is "magic," it is the magic of the legislative authority vested in Congress by our Constitution and may not be so easily overcome by "sleight of hand" or "word games."

CONCLUSION

For the reasons described above, the decision of the Seventh Circuit below should be vacated and this case should be remanded with instructions to apply the anti-cutback provisions of ERISA Section 204(g) and Tax Code Section 411(d)(6) in a manner consistent with the Fifth Circuit's decision in *Spacek*.

Respectfully submitted,

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In the Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Interest of the *Amicus*[1]

The National Employment Lawyers Association ("NELA") and its 67 state and local affiliates have a membership of over 3,000 attorneys. NELA is the nation's only professional membership organization of lawyers who represent employees in labor, employment, and civil rights disputes. NELA supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA has filed *amicus curiae* briefs before this Court and numerous courts of appeals regarding the interpretation and application of the Employee Retirement Income Security Act ("ERISA") to ensure that the rights of workers are protected. For example, NELA participated in filing *amicus curiae* briefs in this Court's decisions in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002).

In NELA's view, ERISA's "anti-cutback" rule, 29 U.S.C. § 1054(g), protects employees who earn benefits under a defined set of terms and conditions against the subsequent imposition of more restrictive conditions on the availability of those benefits. Like anyone else, employees who participate in company and union-sponsored pension plans need to be able to plan their futures knowing that their ability to earn additional needed income after retirement will not be restricted by later plan amendments. NELA members represent participants in both single-

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no person or entity other than amicus curiae and its undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party authored this brief in whole or in part. Petitioner and Respondent filed a joint consent to the filing of amicus briefs with the Clerk of this Court.

employer and multiemployer pension plans who have an interest in preserving the protection of ERISA's anti-cutback rule.

For these reasons, *amicus* respectfully requests that the Court consider its views in support of the Respondents.

Summary of Argument

The Respondents, Thomas Heinz and Richard Schmitt, both worked in the construction industry and earned credits toward pensions in a multiemployer pension plan administered by the Central Laborers' Pension Fund ("the Plan"). *Heinz v. Central Laborers' Pension Fund*, 303 F.3d 802, 803 (7th Cir. 2002). The Plan's rules allowed participants to retire with *unreduced* pensions at any age once they accrued at least 30 pension credits.[2] When Respondents accrued these credits and at the time they retired, the Plan terms permitted participants to receive pension benefits while working in other jobs in the construction industry, so long as they did not work as construction laborers in any job classification covered by a collective bargaining agreement or in any occupation or job classification requiring contributions to the Plan. *Id.* at 803. Relying on this rule, Heinz and Schmitt retired in 1996 and then went to work as *supervisors*, *id.*—a common practice in a variety of industries where multiemployer plans are prevalent. Supervisory positions are not even eligible to be covered by the Plan. Consequently, at the time Heinz and Schmitt accepted supervisory positions, the terms of the Plan permitted them to work in these

[2] Because the Plan allowed accrual of more than one pension credit per year, Heinz and Schmitt had each earned 30 or more pension credits by the time they retired even though they were both relatively young. *Heinz*, 303 F.3d at 803.

positions and receive their pension benefits. However, in 1998, the Fund amended its rules to provide for suspension of pension benefits while a retiree is employed in the construction industry in any capacity. *Id.* By its terms, this amendment ("the 1998 Amendment") applied not only prospectively, but to benefits accrued by Plan participants before the amendment went into effect. *Id.* at 804 n. 2.

Like the Plan here, many multiemployer plans contain rules that suspend payments of early or normal retirement benefits if a participant is re-employed in a job that is covered, or could be covered, by the plan. The statutory and equitable problems arise when the suspension of benefit rules are expanded and the new rules are applicable to benefits that a retired plan participant already has earned under the pre-amendment terms of the plan. In this instance, it is undisputed that the Plan expanded the definition of prohibited re-employment (to encompass any re-employment in the construction industry, including supervisory positions) *after* Heinz and Schmitt earned their rights to receive benefits, retired, and began receiving those benefits. *Id.* at 803-04.

ERISA's anti-cutback rule prohibits a plan amendment that "has the effect of . . . reducing an early retirement benefit." ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2). A straightforward reading of the statutory text, faithful to the statute's purpose of protecting employees' anticipated benefits, demonstrates that a plan amendment that retroactively narrows the types of permissible post-retirement employment in which retirees may engage without losing their pension benefits violates ERISA's anti-cutback rule because it "has the effect of . . . reducing" early retirement benefits. *Id.* The implementing regulations issued by the Secretary of Treasury specifically provide that plans may not be amended to add "conditions restricting the availability of a . . . protected benefit." 26 C.F.R. § 1.411(d)-

4, Q&A 7. In short, early retirement benefits are "protected benefits" and a plan cannot be amended to impose additional limitations on post-retirement employment for early retirees because such amendments restrict the availability of the protected benefits.

The narrow issue before this Court is whether the Plan's 1998 Amendment has the effect of reducing benefits for participants, such as Respondents Heinz and Schmitt, who have already retired and commenced receiving early retirement pensions. *Heinz*, 303 F. 3d at 805. Petitioner and its *amici* invite the Court to opine on the question of whether a plan may change suspension of benefits rules applicable to the accrued benefits of participants who have not retired. If the Court reaches this question, NELA believes that the anti-cutback rule logically and properly applies to all benefits accrued before the amendment. Indeed, as amended by the Retirement Equity Act of 1984 ("REA"), ERISA § 204(g)(2), 29 U.S.C. § 1104(g)(2), specifically protects rights to early retirement benefits "attributable to service before the amendment," i.e., even before the employee fulfills all of the conditions necessary for early retirement. *See, e.g., Dade v. North Am. Philips Corp.*, 68 F.3d 1558, 1562 (3d Cir. 1995) (stating that ERISA § 204(g)(2) protects "benefits attributable to service before the amendment" so long as the participant eventually "grows into" entitlement to the benefit, although holding that the plan in question had not been amended). Thus, if a plan adopts a more restrictive prohibited re-employment rule after a participant, for example, has worked 29 of the 30 years necessary for receipt of an unreduced early retirement benefit, that rule may only be applied to the additional benefits accrued in the participant's subsequent year(s) of employment. If the employee retires 1 year after the amendment, the plan may permissibly apply the more restrictive suspension rule to that portion of the benefit attributable to this last year of employment, but it may

not apply the more restrictive rule to that portion of the benefit attributable to the 29 pre-amendment years.[3]

Retirees increasingly work in new positions while receiving retirement benefits. Whether this trend is the result of economic necessity or other factors, the fact remains that during the years when they are accruing benefits in pension plans that promise to allow post-retirement work, they plan their retirements in anticipation of being able to work at other jobs subject to the plan rules in effect during the planning process. Plans must not be allowed to change the rules on these employees after having created statutorily protected and justifiable expectations.

Argument

I. Expanding the Rules for Suspending Payments of Early Retirement Benefits Restricts the Availability of Benefits in Violation of ERISA's Anti-Cutback Rule.

As originally enacted in 1974, ERISA's anti-cutback rule provided that the "accrued benefit of a participant under a plan may not be decreased by an amendment of the plan . . . ." ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). In the

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[3] Indeed, one *amicus* posits exactly this type of rule, but complains that it would be unfair to plans because, *inter alia*, it would not enable plans to solve funding deficiencies. *See* Brief of the Central States, Southeast and Southwest Areas Pension Fund as *Amicus Curiae* in Support of Petitioner at 8. However, as discussed in Section I, below, Congress expressly provided a mechanism by which a plan in dire financial straits may apply for permission to effectuate a retroactive reduction in accrued benefits. Nothing in ERISA authorizes plans to change their suspension rules to perform this function, and, as discussed in Section III below, the actuarial and other arguments advanced by *amici* for Petitioner are unpersuasive.

ensuing years, the circuits divided on whether this protection covered both early and normal retirement benefits or only normal retirement benefits. *Compare Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985) (protecting both normal and early retirement benefits), *with Bencivenga v. Western Pa. Teamsters Pension Fund*, 763 F.2d 574, 580 (3d Cir. 1985). In 1984, the rule was modified by the REA to clarify that "a plan amendment which has the effect of . . . reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2), as amended by Pub. L. No. 98-397, 98 Stat. 1426 (1984).

Importantly, Congress offers hardship procedures under ERISA §§ 302(c)(8) and 4281, 29 U.S.C. §§ 1082(c)(8) and 1441, by which plans in dire financial straits may seek approval from the Secretary of the Treasury to adopt amendments, even retroactive ones, that reduce accrued benefits, including early retirement benefits. Factors considered in determining business hardship under ERISA §§ 302(c)(8) and 4281, 29 U.S.C. §§ 1082(c)(8) and 1441, include, but are not limited to, whether: "the employer is operating at an economic loss"; "there is substantial unemployment or underemployment . . . in the industry"; "the sales or profits of the industry concerned are depressed or declining"; "it is reasonable to expect the plan will be continued only if a waiver is granted." However, the Petitioner does *not* contend that it was facing sufficient financial hardships to justify such an amendment under the procedures offered in the statute.

A. The Central Laborers' Amendment to Its Rules for Suspending Benefits Plainly Had the Effect of Reducing Early Retirement Benefits Because It Added Conditions that Restrict the Availability of Those Benefits.

Because Heinz and Schmitt were entitled to receive accrued pension benefits before the 1998 Amendment, and were not entitled to continue to be paid those benefits as a result of the amendment, the amendment "has the effect of . . . reducing" their early retirement benefits. ERISA § 204 (g)(2), 29 U.S.C. § 1054 (g)(2). Although the Seventh Circuit's decision relies principally on a straightforward reading of the text of ERISA, it also finds support in the Secretary of Treasury's regulations interpreting the anti-cutback rule. In 26 C.F.R. § 1.411(d)-4, Q&A-7,[4] the question is asked:

> May a plan be amended to add . . . conditions restricting the availability of a section 411(d)(6) protected benefit?

The answer is unequivocal:

> No. The addition of . . . objective conditions with respect to a section 411(d)(6) protected benefit that has already accrued violates section 411(d)(6). Also, the addition of conditions (whether or not objective) or any change to existing conditions with respect to 411(d)(6) protected benefits that results in any further restriction violates section 411(d)(6).

26 C.F.R. § 1.411(d)-4, Q&A-7. *See Michael v. Riverside Cement Co. Pension Plan*, 266 F.3d 1023, 1027-28 (9th Cir.

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[4] Section 411(d)(6) is the Internal Revenue Code analog to ERISA Section 204(g). It contains identical language regarding amendments which have the effect of reducing early retirement benefits. *Compare* 26 U.S.C. § 411(d)(6) *with* 29 U.S.C. § 1054(g)(2).

2001) (finding that the conditions for receipt of early retirement benefits are "[a] valuable component of those benefits").[5]

There should be no serious dispute that the 1998 Amendment added "conditions restricting the availability" of Heinz and Schmitt's early retirement benefits. 26 C.F.R. § 1.411(d)-4, Q&A-7. Before the 1998 Amendment, those benefits were available if Respondents worked in supervisory positions; afterwards, they were not available if Respondents worked in those positions.

Based on the IRS anti-cutback regulation, the Seventh Circuit decided that

> [a] participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit "reduces" the benefit just as surely as a decrease in the size of the monthly benefit payment.
>
> . . .
>
> Although with a suspension the interruption in payments is temporary, the retiree never recovers the payments lost during the employment period.

Heinz, 303 F.3d at 805-06. Thus, the 1998 Amendment reduced Heinz and Schmitt's "early retirement benefits by expanding the conditions triggering a suspension of benefit payments." *Id.* at 813. Because the 1998 Amendment

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[5] Even Judge Paez, who dissented from the holding in *Michael*, agreed that in making a determination of whether or not a new amendment has the effect of reducing benefits "all 'features of the benefit formula' that may enhance a plan participant's benefit . . . must be considered in determining a plan participant's 'accrued benefit' under the pre-amendment plan." 266 F.3d at 1029 (Paez, J., dissenting).

"has the effect of . . . reducing" the participants' early retirement benefits, it plainly violates the anti-cutback rule. ERISA § 204(g)(2), 29 U.S.C. § 1054 (g)(2).

Even more egregious than the month-by-month deprivations of benefits here, under some plans' suspension of benefit rules, the loss of benefits is not limited to the time during which the retiree is re-employed. For example, the plan at issue in *Spacek v. Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998), imposed a minimum loss of *six months* of early retirement benefits regardless of the duration of the proscribed employment. 134 F.3d at 286. Thus, when a plan amendment expanded the definition of prohibited employment, the amended rule not only suspended Spacek's benefits during the time that he was actually working, but also *penalized* him for having accepted re-employment for even a short period of time. Here, as the Seventh Circuit noted, although there is no comparable penalty, the benefits lost during the period of newly prohibited employment will never be recovered by Respondents. *Heinz*, 303 F.3d at 806. Thus, the total benefits that Heinz and Schmitt will receive during their lifetimes will be less than the total they would have received absent the 1998 Amendment; i.e., their benefits have been reduced permanently.

B. Participants Who Fulfill the Terms and Conditions for Early Retirement Benefits Must Actually Receive the Promised Benefits.

As the Seventh Circuit observed (*Heinz*, 303 F. 3d at 812), its opinion is consistent with other decisions holding that once a participant fulfills the required conditions to obtain benefits, a plan may not change those conditions in a manner that causes the participant to lose all or a part of those benefits. "ERISA protects the benefits described in the Plan by ensuring that, if a pensioner is promised a

benefit and fulfills the conditions required to receive it, the pensioner will actually receive *the described and promised benefit*." *Hickey v. Chicago Truck Drivers, Helpers and Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir. 1992) (emphasis added).

The *Heinz* decision is consistent, furthermore, with the analysis in other decisions interpreting ERISA's anti-cutback rule. In *Michael*, the Ninth Circuit held that a plan amendment violated ERISA by changing the conditions regarding re-employment. 266 F.3d at 1028-29. The plan in effect at the time of Michael's initial early retirement provided that benefits paid would not be used as an offset against any additional benefits accrued during subsequent re-employment. *Id.* at 1025. However, the plan was amended to change the conditions for offsets, and application of the amendment to Michael resulted in a substantial loss of accrued benefits at the time of his second retirement. *Id.* at 1027.[6] *See also Shaw v. Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458, 1464-66 (9th Cir. 1985), *cert. denied*, 471 U.S. 1137 (1985) (holding that a plan's "living pension" feature, pursuant to which retirees' benefits might increase after their retirements if there were increases in the wage rates of those employees working in the retirees' former job

[6] *See also Bellas v. CBS, Inc.*, 221 F.3d 517, 525-26, 532 (3d Cir. 2000), *cert. denied*, 531 U.S. 1104 (2001) (relying on Senate Report on REA, S. Rep. 98-575, 98th Cong., 2d Sess. at 28 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2574, in finding that benefits accrue "upon their creation rather than upon the occurrence of the unpredictable contingent event"; therefore, as long as the employee meets the plan's *conditions* for a subsidized early retirement benefit (a "retirement-type subsidy" protected by Section 204(g)) before or after the date of an amendment, the benefits accrued up to the date of the amendment cannot be eliminated or reduced).

classifications, was part of the accrued benefit that could not be eliminated by an amendment).[7]

II. The Fifth Circuit's *Spacek* Decision Is Misguided.

In *Spacek*, the Fifth Circuit reached a contrary conclusion.[8] The *Spacek* panel found that Congress used "suspension" and "reduction" in "distinct ways"; therefore, the panel determined that any suspension of a retiree's benefits, even if it is based on new terms introduced by amendment after the retiree's benefits commence, does not reduce the retiree's benefits and therefore does not violate the anti-cutback rule. 134 F.3d at 288-89. The *Spacek* court relied on the inclusion of the term "suspension" in addition to "reduction" in certain sections of ERISA Title IV (which covers plan terminations), on an unrelated regulation applicable to plans that require employee contributions, and on what it characterized as the legislative history of REA. *Id.* at 289-90.

The Fifth Circuit concluded that interpreting "reduction of benefits as including suspension of benefit payments would make the word 'suspension' redundant in all of these [Title IV's] statutory provisions and interpretive

[7] Although *Shaw* involved normal retirement benefits, rather than early retirement benefits, and did not take into account the changes enacted by Congress in REA, its logic applies equally to early retirement benefits that are now protected by REA.

[8] The result in *Whisman v. Central States, Southeast & Southwest Pension Fund*, 55 F.3d 1140, 1148 (6th Cir. 1995), does not conflict with the Seventh Circuit's decision in *Heinz*. In *Whisman*, the Sixth Circuit found that "the result *would have been the same*" for the retiree under the pre-amendment suspension rule, 55 F.3d at 1148 (emphasis added); therefore, the discussion which distinguished a reduction in accrued benefits from a suspension was dicta.

regulations." *Spacek*, 134 F.3d at 289. In so holding, the Fifth Circuit overlooked two alternatives that would have negated its analysis: (1) that suspensions of benefit payments are a subset of reductions under Section 204, which in other contexts, Congress needed to mention separately; and (2) that suspensions of benefit payments can have the "effect of . . . reducing" early retirement benefits. ERISA § 204 (g)(2), 29 U.S.C. § 1054 (g)(2).

The *Heinz* majority reviewed each of the Fifth Circuit's arguments and found them unpersuasive. 303 F.3d at 807. Although the distinctions on which the Fifth Circuit relied make for interesting debate, they should not trump the straightforward meaning of the statutory phrase "which has the effect of . . . reducing early retirement benefits" in ERISA § 204 (g)(2), 29 U.S.C. § 1054 (g)(2), or the stated purpose of ERISA to ensure that workers received "anticipated benefits." ERISA § 2(a), 29 U.S.C. §1001(a).

A. ERISA Title IV Does Not Indicate that Reductions of Benefits and Suspensions of Benefit Payments Are Mutually Exclusive Categories.

The *Spacek* panel found that ERISA Title IV's plan termination provisions distinguish between a "reduction" of benefits and a "suspension" of benefit payments. 134 F.3d at 288-29. The panel concluded that the inclusion of amendments to suspension of payment provisions within Section 204's prohibition on decreases in accrued benefits would render the references to suspension of benefits in the plan termination title of ERISA "redundant." *Id.* at 289. However, as *Heinz* explained, "[o]ur interpretation of the anti-cutback rule does not suggest that *all* suspensions are 'reductions' (or vice versa), only that *if* the suspension is pursuant to an amendment that reduces benefits (attributable to service before the amendment), then

it is a reduction within the anti-cutback rule." *Heinz*, 303 F.3d at 807 (emphasis in original).

Indeed, the plain words of ERISA § 204(g) and ERISA Title IV support the conclusion that an amendment resulting in a suspension of benefits may have the effect of *reducing* early retirement benefits. As discussed above, ERISA § 204(g) provides that benefits may not be decreased by amendment "other than an amendment described in section 302(c)(8) or section 4281." ERISA § 4281(d)(1) provides that when a terminated multiemployer plan reaches insolvency, "payments which are not basic benefits shall be *suspended* . . . to the extent necessary to *reduce* the sum of such payments [to certain levels]." 29 U.S.C. § 1441(d)(1) (emphasis added). Thus, in Title IV, Congress recognized that suspensions of benefits may *have the effect of* reducing payments to retirees.

Another regulation the Secretary of Treasury issued under ERISA's anti-cutback rule, 26 C.F.R. § 1.411(d)-3(b), further supports the Seventh Circuit's conclusion that the anti-cutback rule encompasses any amendments to the suspension provisions that have the effect of reducing benefits. This regulation provides that in determining whether an accrued benefit has been reduced by a plan amendment, "all the provisions of a plan affecting *directly or indirectly* the computation of accrued benefits which are amended with the same adoption and effective dates" must be considered together. 26 C.F.R. § 1.411(d)-3(b) (emphasis added). Accordingly, in describing the provisions of a plan that must be considered in determining whether an amendment or group of amendments has the effect of reducing benefits, the Treasury regulations require the plan to take into account both direct and indirect effects. Even if a change in suspension rules cannot be characterized as a *direct* reduction in benefits because it is conditional, rather than absolute (i.e., a retiree's payments are only reduced *if* he or she engages in the

newly-prohibited employment), such a change certainly works an *indirect* reduction and, therefore, has the effect of reducing accrued benefits.

B. A Regulation Applicable to Plans that Require Employee Contributions Does Not Relate to the Scope of the Anti-Cutback Rule.

The *Spacek* court (*see* 134 F.3d at 290), also relied on a Treasury Department regulation addressed to defined benefit retirement plans that require employee contributions (which is a relatively unusual requirement these days). The regulation provides, *inter alia*, that plans requiring employee contributions need not actuarially adjust the participant's accrued benefit following a suspension of benefits *permitted* under ERISA Section 203(a)(3)(B). 26 C.F.R. § 1.411(c)-1(f). A thorough review of the Treasury Department regulation, however, shows that it never addresses whether suspensions are, or are not, a type of reduction. *Id.* In addition, neither the plan in *Spacek* nor the Central Laborers' Plan at issue here requires employee contributions; thus, the Treasury Department regulation is inapplicable.

Moreover, the regulation cited by the *Spacek* court does not relate to whether a *change* in a plan's suspension rules *has the effect of* reducing early retirement benefits. As Judge Williams wrote for the *Heinz* majority, "[t]o say that a *suspension* is not a forfeiture (or does not decrease accrued benefits) is not the same as saying that a *change* in the rules governing suspensions cannot decrease accrued benefits." 303 F.3d at 812 (emphasis in original).

C. The Spacek Court's Use of Ambiguous Legislative History Is Inconsistent with this Court's Precedents.

When statutory language is plain and unambiguous, there is no reason to resort to legislative history. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Because the language of Section 204(g)(2) prohibits a plan amendment that "has the effect of . . . reducing" early retirement benefits, resort to the legislative history is not needed. Nevertheless, in *Spacek*, the Fifth Circuit relied on one sentence from a floor statement on REA. 134 F.3d at 289-90. Specifically, the panel relied on a remark by Representative William Clay, made three days *after* the Senate passed the bill, that the amendment to Section 204(g) would not affect "'the authorization for multiemployer plans to adopt stricter rules for the suspension of subsidized early retirement benefits.'" 134 F. 3d at 289 (quoting 130 Cong. Rec. 23,487 (Aug. 9, 1984)). This notion is not reflected in any other part of the legislative history, including the Senate Report that contains the most comprehensive description of Congress' intent. *See Heinz*, 303 F.3d at 809-10; S. Rep. 98-575, reprinted in 1984 U.S. Code Cong. & Admin. News 2547, 2573-74.[9]

In addition, the *Heinz* majority found Representative Clay's statement ambiguous as to whether it meant (1) that the amended anti-cutback rule would allow multiemployer plans to change the suspension rules as to benefits that already have accrued (the Fifth Circuit's conclusion), or (2) that the amended rule would allow the plans to

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[9] One member of Congress does not have the power to change the meaning of the statutory text by making a statement in the Congressional Record. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (noting that "the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history"). When statutory language is plain, resort to legislative history is often like "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

change the rules only for benefits that accrue after the amendment. *Heinz,* 303 F.3d at 809-10. Accordingly, the Seventh Circuit concluded that this lone sentence of legislative history was unpersuasive. *Id.* at 810. As this Court recently reiterated in a similar situation, "[f]loor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text." *Barnhart*, 534 U.S. at 457. Coincidentally, in *Barnhart*, the House already had passed the bill at issue three days before the two Senators in question spoke. *Id.* at 457 n. 15. Here, the Senate passed the bill three days before Representative Clay spoke, and the Senate Report on the legislation contains no indication of the legislative intention that the Fifth Circuit inferred from his ambiguous remark. *Heinz*, 303 F.3d at 810 n. 13.

III. ERISA Should Be Interpreted, Where Reasonable, to Protect the "Reasonable Expectations" and "Anticipated Benefits" of Participants.

In enacting ERISA, Congress incorporated into the statute itself the finding that employees "are losing anticipated retirement benefits." ERISA § 2(a), 29 U.S.C. § 1001(a). Congress also required that plan terms be embodied in governing documents that "specify the basis on which payments are made . . . from the plan," and it required that plan fiduciaries follow the terms of such documents. ERISA §§ 402(b)(4), 404(a)(1)(D), 29 U.S.C. §§ 1102(b)(4), 1104(a)(1)(D).

The "anticipated benefits" and reasonable expectations of participants include the terms and conditions under which they may work while continuing to receive their pension payments. Those terms and conditions are an

integral part of the benefits themselves. While nothing in ERISA prevents plans from changing the terms and conditions applicable to future benefit accruals, such changes cannot be imposed on benefits already accrued by participants in reliance on certain plan terms.

Although Heinz and Schmitt may not fit everyone's image of pensioners, having been near age 40 when they retired, the outcome of their case affects hundreds of thousands of retired participants in multiemployer plans—those who spend most of their working lives in the same industry but, by their 40s, 50s, or early 60s,[10] are unable to work any longer in covered employment due to injuries or the toll the work has taken on them generally. When they can no longer work in covered employment, these workers often turn to supervisory jobs to earn additional money to ensure that they and their families have sufficient funds to support themselves currently and to put aside funds for the future when they can no longer work at all. These workers often lack the training and experience to obtain employment in *other* industries and are likely to face barriers to being hired in many occupations due to age. Nonetheless, they are sometimes able to move into supervisory or other permissible positions within the industry in which they have experience. In this way, these workers can supplement their benefits with earned income for as long as possible, enhancing their financial security for the rest of their lives.

Petitioner and its *amici* have accused such workers of "double-dipping," arguing that pension benefits should

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[10] *See, e.g., Whisman*, 55 F.3d at 1143 (participant retired from the trucking industry at age 49 and began working for the United States Postal Service as a "'flexible' employee"); *Spacek*, 134 F.3d at 286 (participant retired at age 51 after working for 30 years in the longshore industry and began working as a superintendent for a stevedore company).

not be used as supplemental income. *See* Brief of the Central States, Southeast and Southwest Areas Pension Fund as *Amicus Curiae* in Support of Petitioner at 2, 7 ("Central States Br."); *Amicus Curiae* Brief for the Society for Human Resource Management Supporting Petitioner at 2, 7; Brief for the National Coordinating Committee for Multiemployer Plans, *et al.*, as *Amicus Curiae* Supporting Petitioner ("NCCMP Br.") at 17-18, 27. While this may have served as a smear in the past, society has moved beyond the idea that public policy is served by discouraging retirees from returning to work. For example, pursuant to the Senior Citizens' Freedom to Work Act of 2000, 106 Pub. L. No. 182, 114 Stat. 198 (2000), recipients of Social Security now suffer no reduction in benefits if they continue to work upon reaching full retirement age. *See* 42 U.S.C. §§ 402, 403, as amended by 106 Pub. L. No. 182, 114 Stat. 198 (2000).

Moreover, the "double-dipping" argument fails to recognize the practical reality that increasingly, many people in the United States, particularly those between the ages of 55 and 64, continue to work following retirement. Thirty-seven percent of men in the United States in this age group who received income from pension benefits or retirement savings in 1999 were employed full or part time in March 2000, "an increase of more than four percentage points over the comparable rate in 1994, when it was 32.5 percent." Patrick J. Purcell, *Older Workers: Employment and Retirement Trends*, Monthly Labor Review, Vol. 123, No. 10, October, 2000, at 23, *available at* www.bls.gov/opub/mlr/2000/10/art3abs.htm. *See* Diane E. Herz, *Work After Early Retirement: An Increasing Trend Among Men*, Monthly Labor Review, Vol. 118, No. 4, April 1995 at 14, *available at* www.bls.gov/opub/mlr/1995/04/art2abs.htm (finding similar trend between 1984 and 1993). Similarly, thirty-one percent of women aged 55 to 64 who were employed in March 2000 had received pension or retirement income in 1999. *See* Purcell, Monthly Labor Review, Vol. 123, No. 10, at 23.

As a result, today's retirement planning often takes into account expected income from post-retirement employment. *See*, *e.g.*, Fred Brock, RETIRE ON LESS THAN YOU THINK, THE NEW YORK TIMES GUIDE TO PLANNING YOUR FINANCIAL FUTURE AND HOW TO DIFFUSE IT, 18-19 (Times Books 2004); Ed Slott, THE RETIREMENT SAVINGS TIME BOMB, 37 (Penguin Books 2003). Indeed, it is just such planning that would be frustrated by the interpretation of the anti-cutback rule urged by Petitioner and its *amici*. Thus, an employee who is considering retirement from his or her job (and from all other jobs covered by the multiemployer plan) will calculate expenses and decide that the combination of an unreduced early retirement benefit and anticipated work in a new job of a type that the plan allows will enable him or her to meet those expenses (and, perhaps, put aside additional funds for the day when he or she will not be able to work at all). To allow a plan to change the rules after retirement would fly in the face of ERISA's protection of participants' legitimate expectations.[11]

As employees age and accrue benefits under pension plans, they are more likely to begin the process of planning

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[11] Consistent with the notion of allowing workers to plan for their retirement, the Secretary of Labor has promulgated a regulation giving participants the opportunity to obtain prospective information as to the potential application of suspension of benefit rules to particular jobs. 29 C.F.R. § 2530.203-3(b)(6). The regulation requires plans that have suspension of benefit rules to provide a procedure for employees to request an advance determination of whether specific post-retirement employment will trigger suspension rules. *Id.* The purpose of this regulation is to assist participants in making informed decisions *before* they retire.

for their retirements. Relying on plan rules that allow them, for example, to work as supervisors after their retirements, they may decide that they can forego savings out of their wages because they will be able to receive their retirement benefits and simultaneously engage in such employment. If, after such an employee has worked 29 of the 30 years necessary for an unreduced early retirement benefit, a plan is allowed to change the rules, then it will be too late for the worker to make up for these lost opportunities to save for his or her twilight years.

Petitioner's *amici* assert that changes in the labor market make it unlikely that plan participants have any expectations about the availability of post-retirement employment. *See* Central States Br. at 4, 9. However, this argument overlooks the practical reality, discussed above, that post-retirement employment is increasingly common and often is necessary to supplement retirement income. *See also, e.g., Logrande v. Local 851 Employer Group Pension Plan*, 695 F.Supp. 92, 92-93 (E.D.N.Y. 1988) (participant forced to return to work after retiring at age sixty-four because his pension was insufficient to support son who had contracted AIDS).

Petitioner's *amici* also argue that participants have control over whether to remain in prohibited post-retirement employment after a change in suspension rules. *See* Central States Br. at 9. However, this argument misses the point. Retirees cannot unwind their retirements and return to covered employment if the suspension rules are changed. The only real control that participants can exercise is to engage in informed planning for their retirements and to make informed decisions as to retirement based on that planning. Participants must be able to evaluate their expected post-retirement income based on the terms of the plan, *including* the re-employment suspension rules which allow them to engage in certain types of post-retirement employment.

Petitioner's *amici* raise a series of additional policy arguments in attacking the Seventh Circuit's ruling. *See, e.g.*, Central States Br. at 7 (suspension of benefit rules ensure that non-union non-contributing employers, which do not make pension contributions for employees already receiving pension benefits, do not receive an unfair advantage over contributing union employers); Central States Br. at 4, 8; NCCMP Br. at 4-6, 12, 14-15, 17-18 (applying expanded suspension of benefits rules to those who already have accrued pension benefits allows plans to protect their actuarial health and respond to fluctuations in the labor market); NCCMP Br. at 26-27 (if plans are unable to adequately ensure their actuarial health, they will have difficulty attracting new participating employers).

Although fluctuations in the labor market, the performance of plan assets, and competition with non-union non-contributing employers are legitimate concerns, Petitioner's *amici* fail to explain why the burden of compensating for such factors should fall on individual plan participants who already have accrued benefits under a set of rights and expectations and who, because of their relatively advanced ages, will be unable to recover from the loss of anticipated post-retirement income. Indeed, the argument of these *amici* could be used to support a reduction in any plan participant's accrued benefits of any type. However, Congress, which was quite cognizant of plan funding issues,[12] nevertheless enacted the anti-cutback rule and expanded it in 1984.

ERISA expressly provides for an exception to the anti-cutback rule in cases of "substantial business hardship."

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[12] The legislative history is replete with testimony about failures of underfunded plans, such as Studebaker's. *See Nachman v. PBGC*, 446 U.S. 359, 375 n. 22 (1980) (quoting 1973 floor statement by Senator Harrison Williams, a chief sponsor of the Senate version of ERISA).

ERISA §§ 302(c)(8) and 303(b), 29 U.S.C. §§ 1082(c)(8) and 1083(b).[13] Unlike individual participants, plans thus have a mechanism, built into ERISA, which allows them to respond to labor and market fluctuations. The Plan claims no such hardship here.

Furthermore, Petitioner's *amici* provide no support for the argument that the Seventh Circuit's ruling will benefit non-union employers to the detriment of union employers. *See* Central States Br. at 7. As set forth above, retired plan participants, such as Heinz and Schmitt, often are re-employed as supervisors for unionized employers, rather than as rank-and-file employees of non-unionized employers. *See also Spacek*, 134 F.3d at 286. Even if they are employed as supervisors for non-union employers, they are not taking away potential union jobs or reducing the potential contributions to the multiemployer plan. It is well-established that supervisory positions are non-union positions, *see* 29 U.S.C. § 157 (affording employees the right to organize); 29 U.S.C. § 152(3), (11) (distinguishing supervisors from employees).[14]

Conclusion

Multiemployer pension plans should not be allowed to pull the financial rug from under their participants by changing rules governing the availability of pension

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[13] See Section I, above, with respect to the specific test to meet this exception.

[14] Petitioner's *amici* provide no support for their contention that plans will have difficulty attracting new participating employers if the plans are unable to adequately ensure their actuarial health. *See* NCCMP Br. at 26-27. It is doubtful that employers who enter into pre-hire construction labor agreements give any consideration to the structural integrity of the pension funds prior to executing such agreements.

benefits after employees have earned the rights to those benefits.

Participants who earn a right to benefits in reliance on a specific definition of prohibited re-employment justifiably anticipate that they will be able to return to employment in specific positions that are not proscribed under the terms of the plan. Participants cannot engage in financial planning to ensure their families' security during their retirements if the circumstances under which they can receive pension benefits can be restricted at a later time. This is precisely the type of problem that ERISA's anti-cutback rule was intended to address.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

CENTRAL LABORERS' PENSION FUND,

Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

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No. 02-891

IN THE
SUPREME COURT OF THE UNITED STATES

CENTRAL LABORERS' PENSION FUND,

Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit

BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*[1]

AARP, a nonpartisan nonprofit membership organization of over 35 million persons, age 50 or older, working or retired, is dedicated to addressing the needs and

[1] No counsel for any party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. The parties have filed letters with the Clerk expressing their blanket consent to the filing of amicus briefs.

interests of older Americans. Almost half of AARP's members are working. AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity and purpose.[2/] In its efforts to promote independence, AARP works to foster the economic security of individuals as they age by attempting to ensure the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.

AARP's members and other participants in private employer-sponsored employee benefit plans rely on the Employee Retirement Income Security Act (ERISA) to protect their rights. 29 U.S.C. § 1001 *et seq*. It is crucial that participants be able to rely on the pension benefits that have been promised to them and which they have earned because the quality of their lives in retirement depends heavily on their eligibility for and the amount of their pensions. Participants must know that once they have begun receiving pension benefits that these benefits cannot be taken away. Thus, application of plan amendments tightening suspension of benefit rules to those participants who are already receiving their pension benefits, not only will negatively impact their retirement security, but may leave them with little or no time in which to make up any shortfall.

[2/] As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae*, both jointly and singly, in numerous ERISA cases including those involving ERISA § 204(g). *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Bellas v. CBS, Inc.*, 221 F.3d 517 (3d Cir. 2000).

Because this case will have a direct bearing on the economic security of millions of Americans, including AARP members, AARP respectfully submits this brief *amicus curiae*.

SUMMARY OF ARGUMENT

The issue before the Court in this case is very narrow – may a pension plan tighten its suspension of benefits rule limiting where participants may work after retirement and apply this new rule to those participants who are already in pay status. AARP submits that the answer to this question must be no.

If plans are permitted to change eligibility rules for pension benefits, such as limiting where participants may work after retirement, and apply those new rules to participants in pay status, the impact on those participants will be significant. Permitting plans to limit when and where individuals may work after they are already in pay status makes meaningful retirement planning impossible. Significantly, such plan amendments fly in the face of workers' expectations and labor force trends indicating that more individuals are staying in the work force after they "retire." Moreover, although Congress permitted plan sponsors to amend their pension plans, Congress circumscribed such amendments by restricting how and when they can be applied to participants. Congress did not differentiate between multiemployer and single employer pension plans in these restrictions on applying plan amendments to those participants in pay status. For these reasons, the decision of the Seventh Circuit should be affirmed.

ARGUMENT

I. IF PENSION PLANS CAN CHANGE THEIR RULES FOR RECEIPT OF PENSION BENEFITS RETROACTIVELY, NO EMPLOYEE WILL EVER BE ABLE TO MEANINGFULLY PLAN FOR RETIREMENT.

A "secure, comfortable retirement is every worker's dream." SOCIAL SECURITY ADMINISTRATION, DECIDE WHEN TO RETIRE, at http://www.ssa.gov/retire2/index.htm (last visited February 27, 2004). Financial security in retirement depends on the employee's decision and ability to participate in meaningful retirement planning. *Id.*; *see generally* U.S. DEPT. OF LABOR, TOP 10 WAYS TO BEAT THE CLOCK AND PREPARE FOR RETIREMENT, at www.dol.gov/ebsa/publications/10_ways_to_prepare.html (last modified Feb. 27, 2004). Retirement planning is the process by which employees attempt to figure out how much money they will need to live comfortably in retirement. Those employees who participate in retirement planning are "forward-looking in their labor force participation, consumption, and savings decisions," and "have a sense of when they will retire and make tradeoffs . . . in order to accommodate [this] desired standard of living during retirement." CONSTANTIJN PANIS, *et al.*, SOCIAL SECURITY ADMINISTRATION, THE EFFECTS OF CHANGING SOCIAL SECURITY ADMINISTRATION'S EARLY RETIREMENT AGE AND THE NORMAL RETIREMENT AGE 53 (June 2002) (Prepared for SSA by RAND).

In the same manner as employers use pensions as a tool for managing their workforce, employees use pensions as a tool for managing their retirement security. Whether an employee is a participant in a pension plan, under what conditions they are eligible to receive their benefits, and the amount of those

benefits are essential for informed and meaningful retirement planning. Thus, Congress included ERISA's disclosure provisions which require plan administrators to "provide information to plan participants so that they can make rational decisions in planning and saving for retirement." Colleen Medill, *Targeted Pension Reform,* 27 J. LEGIS. 1, 37 (2001). Congress, moreover, made plan sponsors "accountable for the pension benefits they promise to ensure that employees can safely rely on these promises in their retirement planning." *Pension Benefit Guar. Corp. v. Ouiment Corp.*, 711 F.2d 1085, 1092 (1st Cir. 1983); *see also Republic Indus. v. Teamsters Joint Council 83*, 718 F.2d 628, 635 (4th Cir. 1983) (Congress intended "heavy weight to be given to employees' reliance on ultimate realization of their vested benefits"); *In Re Balay*, 113 B.R. 429, 434 (Bankr. N.D. Ill. 1990) ("the Court must remain mindful of the importance of ERISA-qualified plans and their role in retirement planning").

Pensions are always discussed as part of retirement planning with the admonition to "verify information at the time of retirement" and to rely only on written information, not "hearsay." SYLVIA PORTER'S PLANNING YOUR RETIREMENT 17 (1991). In a book published by the International Foundation of Employee Benefit Plans, the author stresses the importance of reading and understanding the individual's pension plan documents. JOHN T. MCCARTHY, FINANCIAL PLANNING FOR A SECURE RETIREMENT 23 (1991). Not surprisingly, advice for retirement planning includes obtaining and reviewing pension plan documents in order to determine the criteria for receipt of a pension and the different distribution options. As one author put it: "You want to avoid nasty surprises come retirement day." JORDAN GOODMAN, EVERYONE'S MONEY BOOK ON RETIREMENT PLANNING, *Pensions* 45 (2002).

Resources for financial planners themselves recognize that pension plans are complicated. Among other issues these resources review are the ability of plan sponsors to change pension plan formulas and the impact of such changes on the amount of benefits that an individual may receive. Significantly, financial planners do not reference the possibility of changes to pension plan benefits after an individual is in pay status. This failure to note even the possibility of a loss of pension benefits after an individual is in pay status is in stark contrast to the information these resources provide concerning retiree health benefits and the recognition that plan sponsors may readily be able to reduce or terminate these health benefits. *See, e.g,* DAVID A. LITTELL, *et al.*, FINANCIAL DECISION MAKING AT RETIREMENT, *Source of Retirement Income: Qualified Retirement Plans* and *Health Insurance Planning for the Older Client* 79-109, 423-425 (5th ed. 2001); *see also* PETER J. STRAUSS AND NANCY M. LEDERMAN, THE COMPLETE RETIREMENT SURVIVAL GUIDE, *Pension, Benefits and IRAs* 283-302 (2d ed. 2003).

Moreover, planning for retirement now necessarily includes working, either full or part-time, during a portion of retirement. Frequently, working during retirement is used as a means for making ends meet or, at a minimum, as a means to prevent an individual from dipping into capital assets. PORTER at 24, 223-24.

Unfortunately, Messrs. Heinz and Schmidt were dealt a nasty surprise after their retirement day. Because the Central Laborers Pension Plan applied changes made to the plan's suspension of benefits rules limiting the types of positions laborer retirees could work after Messrs. Heinz and Schmidt were in pay status, no amount of retirement planning, reading or understanding of their pension plan provisions would have mattered in their case. There would be no way that they should

have, would have or could have known of changes in the plan rules affecting their pension benefits once they were in pay status.

If pension plans can change their plan provisions to apply to a participant who is already in pay status, retirement planning will become meaningless. Not only will a pension participant not be able to rely upon the plan documents, but the pension benefit itself becomes illusory.

II. NUMEROUS EMPLOYEES EXPECT THAT THEY WILL WORK IN RETIREMENT IN ORDER TO MAKE ENDS MEET.

A. Working as Construction Supervisors While Receiving Benefits Earned as Construction Laborers Was Perfectly Permissible at the Time of Messrs. Schmidt and Heinz's Retirement and Should Not Be Disparaged as Double Dipping.

Some *amici* disparagingly refer to Messrs. Heinz and Schmidt's return to work as "double-dipping." National Coordinating Committee for Multiemployer Plans' ("NCCMP") Brief *Amicus Curiae* at 11; U.S. Brief *Amicus Curiae* at 15. As a general rule, "an individual who is retired from service with *the state, a municipal corporation, or a political subdivision of the state*, may not engage in . . . double dipping, where such individual simultaneously receives pension benefits and compensation for postretirement *public* employment or service." 60A AM. JUR. 2D *Pensions and Retirement Funds* § 1226 (2003) (*emphasis added*). *See also, Slavsky v. New York City Police Dep't*, 967 F. Supp 117, 120 (S.D.N.Y. 1997) (the city's failure to restrict pension payments for workers in the private sector did not affect its ability to

"limit expenditures for those whom the public fisc is liable for both the pension and employment benefits"); Lea E. Selleck, *Post-Retirement Employment Restrictions on Public Employees in Kansas*, 5 KAN. J.L. & PUB. POL'Y 199, 208 (Spring 1996) (noting that "restrictions are often not applied to those public workers who secure postretirement employment in the private sector"). A number of state and local governments have anti-double dipping statutes that "prevent a public pensioner who reenters public employment from the simultaneous enjoyment of both the pension and the compensation for subsequent employment." 60A AM. JUR. 2D at § 1226 (2003). At the same time, while the notion of a public pensioner also working for the same public employer may be viewed negatively in the public realm, it is not unusual for private employers to rehire post-retirement workers as consultants or other professionals. Such a practice recognizes that "retirees may be particularly suited to positions calling for great experience." Selleck at 208.

Unlike in the public realm where the person double-dipping is more than likely working in the same job and receiving a pension, the position of construction supervisor is neither covered by the pension plan nor in direct competition with the jobs covered in the plan. As the Seventh Circuit noted, "there is no question that at the time of plaintiffs' retirement, the plan permitted the very practice that the Fund now disparages – working as construction supervisors while receiving benefits." *Heinz v. Central Laborers Pension Fund*, 303 F.3d 802, 806 n.6 (7th Cir. 2002). The practice of working as a construction supervisor while receiving benefits earned as a construction laborer should not be considered "double dipping," with all of the negative connotations of that term, when it was perfectly permissible at the time of Messrs. Heinz and Schmidt's retirement.

B. Messrs. Heinz and Schmidt's Return to Work Is Consistent Both with Employees' Expectations of Working after Retirement and Actual Labor Force Participation Trends.

Messrs. Heinz and Schmidt's decision to work after their retirement is consistent with the upward trend in labor force participation as well as the expectation of employees that they will continue to work after they "retire." Over the past decade, responses in a number of surveys to queries about retirement plans and expectations have been pointing to a shift in work and retirement patterns. Sizable portions of workers report wanting or expecting to work in retirement. "To retire" no longer necessarily means leaving the work force. For example:

- 73 percent of employed respondents aged 51-61 in the first wave of the Health and Retirement Study say that they would like to continue doing some paid work when they retire. NATIONAL INSTITUTE ON AGING, THE HEALTH AND RETIREMENT STUDY, *HRS National Institute on Aging Press Release* (June 17, 1993), available at http://hrsonline.isr.umich.edu/docs/sho_refs.php?hfyle=ref008&xtyp=1 (Go to http://hrsonline.isr.umich.edu/docs/background/ref008a.html (last visited Feb. 26, 2004) (Survey conducted by the University of Michigan Institute for Social Research).

- 72 percent of all workers, 67 percent of preboomers (ages 53 and older at the time of the survey), 69 percent of early boomers (ages 45-52), and 78 percent of late boomers (ages 34-

44) expect to work part time in retirement. EMPLOYEE BENEFIT RESEARCH INSTITUTE, RETIREMENT CONFIDENCE SURVEY (Oct. 1997), available at http://www.ebri.org/rcs/1997/97rcs_es.htm (last visited Feb. 26, 2004) (Survey prepared by Mathew Greenwald & Assocs. in conjunction with EBRI and American Savings Education Council).

- 80 percent of boomers think that they will work at least part time when they retire. AARP, 1998 AARP BABY BOOMER RETIREMENT SURVEY: PRELIMINARY FINDINGS 2 (July 16, 1998) (Prepared for AARP by Roper Starch Worldwide).

- 69 percent of persons aged 45-74 say they want to work in some capacity in retirement. AARP, STAYING AHEAD OF THE CURVE: THE AARP WORK AND CAREER STUDY 8 (Sept. 2002) (Prepared for AARP by RoperASW).

- 95 percent of preretirees aged 55-64 who plan to retire expect to work in some capacity in retirement. Humphrey Taylor, *The New Vision of Retirement is Very Different Than the Traditional Image for Retirement*, THE HARRIS POLL (May 15, 2002), available at http://www.harrisinteractive.com/harris_poll/printerfriend/index.asp?PID=301 (last visited Mar. 1, 2004).

- 66 percent of workers aged 20 and older say that they think they will work for pay after they retire. EMPLOYEE BENEFIT RESEARCH

INSTITUTE, RETIREMENT CONFIDENCE SURVEY 33 (May 2002) (Survey prepared by Mathew Greenwald & Assocs. in conjunction with EBRI and American Savings Education Council).

- 68 percent of workers aged 50-70 plan to work in retirement or expect never to retire. AARP, STAYING AHEAD OF THE CURVE 2003: THE AARP WORKING IN RETIREMENT STUDY 4 (2003) (Prepared for AARP by RoperASW).

Workers' expectations of continuing to work longer and after retirement are consistent with historical and projected labor force participation trends. A review of historical labor force participation rates since 1980 show a slow but steady increase in the number of people age 50 and up participating in the workforce. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE DATA FILES, *Labor Force Participation Rates, 1980-2000*, at http://www.bls.gov/emp/emplab1.htm (Go to ftp://ftp.bls.gov/pub/special.requests/ep/labor.force/clra8000.txt) (last modified Feb. 11, 2004). Projected labor force participation rates for the near term also show a continuing increase. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE DATA FILES, *Labor Force Participation Rates, 2002-2012*, at http://www.bls.gov/emp/emplab1.htm (Go to ftp://ftp.bls.gov/pub/special.requests/ep/labor.force/clra0212.txt) (last modified Feb. 11, 2004). Consequently, suspension of benefits rules that change after participants are in pay status are counter to current labor force participation trends.

C. Individuals Generally Stay in the Work Force and Return to Work After Retirement for Financial Reasons.

Although people stay in the work force or return to work for a variety of reasons, the primary motivating factor is financial – that is, the need for money and access to health care coverage. STAYING AHEAD OF THE CURVE at 8 (2002). Most employees who have been surveyed who remain in the workforce or return to work do so in order to make ends meet. Almost three-fourths of people surveyed expect that they will have to lower their standard of living in retirement. PORTER at 24, 223-24.

Even if an individual is fortunate enough to have earned a pension benefit from a defined benefit pension plan, the purchasing power of such a benefit is reduced yearly if there is no cost of living adjustment. At 3% inflation, the purchasing power of fixed annual pension from a defined benefit pension plan is reduced by about one quarter after 10 years and in half after 23 years.[3/] Obviously, as the inflation rate increases, the purchasing power decreases. SIDNEY DAVIDSON, *et al.*, FINANCIAL ACCOUNTING: AN INTRODUCTION TO CONCEPTS, METHODS, AND USES 850 (4th ed. 1985). *See generally* JANE BRYANT QUINN, MAKING THE MOST OF YOUR MONEY, *How to*

[3/] The Social Security Administration will use 3% for its intermediate Consumer Price Index assumption for years starting in 2007. 2003 ANNUAL REPORT OF THE BOARD OF TRUSTEES OF THE FEDERAL OLD-AGE AND SURVIVORS INSURANCE AND THE FEDERAL DISABILITY INSURANCE TRUST FUNDS, tbl. V.B1 (Mar. 2003). Since 1996, the rate of inflation for the Consumer Price Index-Urban has ranged from a high of 3.4 % to a low 1.6%. COUNCIL OF ECONOMIC ADVISORS, ECONOMIC REPORT OF THE PRESIDENT, tbl. B.64 (Feb. 2004).

Retire in Style 842-43, 847, 849 (1997) (discussion of impact of inflation on pension's annual loss of purchasing power and retirement security).

By the time Messrs. Heinz and Schmidt reach age 65, the purchasing power of their pension, assuming an inflation rate of 3%, would be reduced by over half from approximately $1650 per month (Central Laborers' Brief at 4) to approximately $808.50 per month.[4/] Given the loss of purchasing power of their pensions over time, a competent retirement planner would have suggested to Messrs. Heinz and Schmidt that they return to work after they were in pay status.

D. Individuals Who Continue to Work or Return to Work Are Generally Employed in Physically Less Demanding Jobs.

According to the Bureau of Labor Statistics, "[c]onstruction laborers perform a wide range of physically demanding tasks involving building and highway construction, tunnel and shaft excavation, hazardous waste removal, and demolition." U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2002-2003, *Construction Laborers* 449, available at http://www.bls.gov/oco/ocos248.htm (last modified Feb. 27, 2004). These jobs may require the laborers to "lift and carry heavy objects, and stoop, kneel, crouch, or crawl in awkward positions." *Id.*

Not surprisingly, several studies have shown that retirement ages are lower for individuals, such as construction

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[4/] The Central Laborers' Pension Plan provides no annual cost of living adjustment to pension benefits and no actuarial adjustment for the period of the suspension of benefits.

laborers, who work in physically demanding occupations. PANIS at 60. On the other hand, "individuals with flexible work hours and the opportunity to perform less demanding work in the same job tend to retire late." *Id.*

It is rational that an individual would not continue to work in or return to the job of a construction laborer because of the physical demands of that job. A position as a construction supervisor would be less physically demanding than a construction laborer. And, "[e]xperience in many construction laborer jobs may allow some workers to advance to positions such as supervisor or construction superintendent." OCCUPATIONAL OUTLOOK HANDBOOK at 450. Given the physical demands of the job of construction laborers, Messrs. Heinz and Schmidt's decision to return to work as construction supervisors, which at the time of their retirement was permissible under the plan terms, was reasonable.

III. CONGRESS DID NOT DISTINGUISH BETWEEN SINGLE EMPLOYER AND MULTIEMPLOYER PENSION PLANS CONCERNING HOW AND WHEN AMENDMENTS IN PENSION PLAN PROVISIONS MAY BE APPLIED TO PARTICIPANTS IN PAY STATUS.

The offering of pension plans in the United States is voluntary. *See, e.g.*, H.R. Rep. No. 533, 93rd Cong., 1st Sess. 1-2 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4639-40; S. Rep. No. 383, 93rd Cong., 1st Sess. 1 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4890. Current law neither mandates that a pension be offered to employees nor, if such a plan is offered, the particular types or amounts of benefits that must be provided to employees. A plan sponsor may design the pension plan benefit structure as it sees fit as long as the plan does not

violate any of ERISA's substantive rules.[5/] *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983) (describing how ERISA does not mandate that "employers provide any particular benefits"). Thus, plan sponsors are "generally free" to amend their employee benefit plans at any time. Such amendments may include termination of a pension plan or change in the types or amounts of benefits. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-444 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

Admittedly, pensions can be a useful tool to employers and labor organizations with which they can recruit, retain and manage a labor force. "Because ERISA does not mandate that employers provide pensions to its employees, it must be that 'employers use pensions as personnel devices that alter quit and hiring decisions.'" Lorraine A. Schmall, *Keeping Employer Promises when Relational Incentives No Longer Pertain: "Right-sizing" and Employee Benefits*, 68 GEO. WASH. L. REV. 276, 290 (2000) (*citing* TERESA GHILARDUCCI, LABOR'S CAPITAL at IX (1992)). For example, in order to decrease their work forces and reduce costs, many employers have turned to early retirement incentives, and some have amended their

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[5/] The Central Laborers' Pension Plan was designed to permit a subsidized early retirement benefit based solely on years of credited service with no age requirement. Approximately 16% of blue collar and service employees who are covered by defined benefit plans participate in plans providing an early retirement benefit with no age requirement. U.S. DEPT. OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, 2000, Bulletin 2555, tbl. 70 (Jan. 2003) (table showing "Defined benefit plans: Requirements for early retirement, full-time employees, private industry).

existing pension plans to include early retirement windows, which offer benefits during specified, limited periods of time. *See generally*, Schmall, at 293-95. Employers and labor organizations have resorted to service pensions such as the one at issue here to legally push older workers out of the work force and move in and promote younger workers. *Economics of the Aging Revolution: Age Discrimination in the Workplace*, at http://www.trinity.edu/~mkearl/ger-econ.html (last visited Feb. 27, 2004).

Central Laborers' Pension Plan and its *amici* argue that if they cannot apply the changes to the suspension of benefits rules immediately and to all participants, the impact on the economics of the plan and the work force will not be felt immediately. *See* Central Laborers' Brief at 23-26; NCCMP Brief *Amicus Curiae* at 10-11. However, all pension plans have definite parameters in the types of changes Congress permitted and when such changes may be applied to participants. Despite the varying uses of plans as personnel devices, plan sponsors do not have a completely unfettered right to amend their employee benefit plans. No substantive provision of ERISA may be violated, no express term of the plan's governing documents may be violated, and ERISA's procedures for adopting an amendment must be followed. *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990). Congress circumscribed the application of pension plan changes to prevent the reduction of accrued benefits, even though the consequence is that the economic impact of such changes will take a period of time to be effective. By so doing, Congress balanced changes needed for financial reasons and for management of the work force for employers and labor organizations with the impact on the individual.

As an example, "[e]arly retirement windows that are offered year in and year out cause problems for employers and employees when the windows become viewed as entitlements or permanent features of benefit plans." Cathy Ventrell-Monsees, *"Take the Money and Run or It's Too Late Baby:" Early Retirement Incentives and the ADEA*, 29 U. MEM. L. REV. 783, 822 (1999). "[R]egulations [interpreting IRC § 411(d)(6)] preclude a pattern of plan amendments that would make benefits available only for a limited period of time if the plan amendments give rise to a reasonable expectation that the benefit is an ongoing feature of the plan, and therefore a valuable right."[6] Rev. Rul. 92-66, 1992-36 I.R.B. 11. Repeated pension plan amendments to allow for such factors as early retirement windows therefore become "treated as provided under the terms of the plan, without regard to the limited periods of time." *Id.* Congress, thus, balanced permitting employers to use early retirement incentives to decrease their work force with the reasonable expectations of employees if such incentives were used on a regular basis. Likewise, the plan sponsor here should not be able to change the suspension of benefit rules to act as a spigot to manage the flow of unionized workers into the work force at will. *See generally*, Central Laborers' Brief at 23. Instead, Congress' balance must be met.

Another example is where a plan sponsor decides to change its benefit formula in order to reduce costs. Let us assume the following as an illustration:

> A plan sponsor decides to reduce the formula for determining the amount of pension benefits from:

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[6] IRC § 411(d)(6) is the Code counterpart of ERISA § 204(g), 29 U.S.C. § 1054(g).

> 1.5% multiplied by years of service multiplied by the average of the highest 5 years of compensation (the old formula)
> to
>
> 1% multiplied by years of service multiplied by the average of the highest 5 years of compensation (the new formula) (in essence lowering the multiplier).

How would this change in benefit formula be applied to participants who are in pay status? It would not.[7/] Those participants would already have earned their benefits under the old formula. If the new formula were permitted to be applied to those persons who had taken their benefit, the plan would have to recalculate their distribution and ask for a return of monies. This would be particularly troublesome if the participants had received their distribution as a lump sum. Suspending a benefit after benefit distributions have begun is no different than asking for a return of a paid benefit distribution – it's taking money away from a participant in pay status.

This illustration of a change in the benefit formula would apply to all current employees. The plan sponsor has a choice of two methods for determining current employees' benefits after the amendment. Treas. Reg. § 1.401(a)(4)-

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[7/] Decreases in accrued benefits are only permitted if they are made in accordance with ERISA § 302(c)(8), 29 U.S.C. § 1082(c)(8), upon a finding of the Secretary of substantial business hardship and the unavailability or inadequacy of a waiver.

13(c)(4)(i); Treas. Reg. § 1.401(a)(4)-13(c)(4)(ii). *See* Treas. Reg. § 1.401(a)(4)-13(c)(6) for examples. No matter what choice the plan sponsor makes, employees can never receive less than what they have already earned at the time of the change. The changes in benefit formula may only be applied prospectively, not retroactively. *Id.*

As shown above, Congress circumscribed how and when plan amendments would be applied to participants in single employer plans. There is nothing in the statute that shows that Congress intended multiemployer pension plans to be treated any differently than single employer plans in how and when pension plan amendments may be applied to participants. *See Hughes Aircraft*, 525 U.S. at 443-444; *Lockheed*, 517 U.S. at 889-91; *Curtiss-Wright*, 514 U.S. at 80.

Here, the plan amendment tightening the suspension of benefits rule should be treated no differently than an early retirement incentive or a change in a benefit formula. The plan sponsor cannot consistently offer early retirement incentives without such incentives becoming a term of the plan. Likewise, the plan sponsor cannot loosen and tighten its suspension of benefits rules without the least restrictive provision becoming a plan term. Nor can a plan sponsor plan reduce its benefit formula and apply it to those who are in pay status.[8/] Similarly, tightening suspension of rules and applying it to those in pay status acts like change in benefit formula. But just like early retirement incentives and changes in benefit formulas, a plan

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[8/] Although being in pay status provides protection from reductions in benefits, being in pay status may also negatively affect a participant. For example, if a participant chooses a joint and survivor benefit (which generally results in a lower benefit) and the spouse predeceases the participant, the plan has no obligation to recalculate the participant's benefit to pay a higher benefit.

sponsor does have the choice of how to apply the amendment to current employees – it can either apply it only to those years of service after the amendment was passed or apply it so that the employee gets the better benefit under the application of the new suspension of benefit provision. *See* Central Laborers' Brief at 16-17.

Indeed, one of Congress's purposes in enacting ERISA was to ensure that "if a worker has been promised a defined benefit upon retirement . . . he actually receives it." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981). ERISA "seek[s] to ensure that employees will not be left empty handed once employers have guaranteed them certain benefits." *Lockheed*, 517 U.S. at 887; *see also Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980). More specifically, by enacting ERISA § 204(g), Congress saw fit to prevent plan sponsors from "pulling the rug out from under" pension plan participants so that participants received the benefit they were promised. *Williams v. Cordis Corp.*, 30 F.3d 1429, 1431 (11th Cir. 1994). If the Court permits a pension plan to apply amendments to tighten eligibility rules to receive pension benefits to participants who are already in pay status, plan sponsors will readily be able to break their promises to employees, totally undermining the purpose of ERISA to provide employees with retirement security. ERISA § 2, 29 U.S.C. § 1001.

CONCLUSION

For the foregoing reasons, AARP urges the Court to affirm the Seventh Circuit's decision.

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